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Report on
Shared Liability

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON SHARED LIABILITY

LRC 88

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian R. D. Smith, Q.C.
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON SHARED LIABILITY

When two or more persons share liability to another, difficult procedural and substantive issues may arise. How is liability apportioned? What rights of contribution or indemnity should exist among the parties?

Many problems flow from the distinction between "joint liability" and "joint and several liability." In this Report it is concluded that this distinction has little contemporary utility and its abolition is recommended.

The *Negligence Act* governs apportionment of fault, contributory negligence and rights of contribution when a person suffers damage at the hands of others. This Act, however, has acquired a heavy patina of case law which suggests that a more modern statement of the law is called for. Moreover, the Act can lead to injustice in particular circumstances.

This Report recommends the adoption, in modified form, of the *Uniform Contributory Fault Act* recently promulgated by the Uniform Law Conference of Canada.

A. Shared Liability

1. Generally

Responsibility is usually regarded as individual, as in "you are responsible for your own actions." It is implicit in this formulation that a person's actions are the sole cause of the result which has occurred. Frequently, however, it is possible to identify more than one cause for a particular effect, and it is sometimes possible to assign responsibility for each cause to different persons.

A person who fails to observe a legal responsibility to another will be liable to him to make good that failure. Liability may arise in a number of ways. A person who borrows money promising that it will be repaid will be liable to repay the money. A person who enters into a binding contract will be liable to perform the contract or pay damages for its breach. A person who intentionally or negligently harms another person or his property will be liable to pay damages in compensation.

If only one person is liable to another, rights of recovery are relatively straightforward. When two or more people share liability, or the person who suffers damage also shares responsibility for his loss, liability must be apportioned. Courts must determine how each of the responsible persons should bear the loss caused by their actions. Apportionment of shared liability can present numerous practical and theoretical problems.

2. Apportionment

At common law, it was thought that liability could not be apportioned. Degree of fault seemed too vague a concept to have meaning. Shared liability was regarded as an indivisible obligation for which all who shared liability were responsible. The person entitled to compensation could require payment in full from any one of those sharing liability. He could not, of course, recover more than the full amount.

A person who was partly to blame for damage to his person or property arising from negligence was not entitled to compensation from any other person contributing to that damage.[1] That position also reflected the belief that fault, and liability for fault, could not be apportioned.

The common law's difficulty with isolating causes for loss or damage often led to harsh results.

3. Contribution

A plaintiff who receives judgment against several co-defendants who share liability is under no obligation to seek recovery even-handedly among them. He may take execution proceedings against any one of the co-defendants, or any combination of them.

A person who satisfies more than his fair share of a judgment (however a fair share is determined) might be entitled to recover the additional amount from his co-defendants. He would sue them for "contribution." At common

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[1] *Butterfield* v. *Forrester*, (1809) 11 East 60, 103 E.R. 926. The doctrine of "last clear chance" arose to mitigate the harshness of the rule barring recovery by a plaintiff who had been contributorily negligent. With the introduction of apportionment legislation, contributory negligence ceased to be a bar and the rationale for the "last clear chance" doctrine disappeared: *see, e.g., Keough* v. *Henderson Highway Branch*, (1978) 91 D.L.R. (3d) 507 (Man. C.A.). The doctrine would appear to have been abolished in British Columbia: *see Negligence Act*, R.S.B.C. 1979, c. 298, s. 1, however, in *Bains* v. *Chabot*, [1984] B.C.D. Civ. 2831-01 (B.C.S.C.), it was said that the doctrine still survives although in most cases the courts are able to rely on the *Negligence Act* to more appropriately apportion liability. The last clear chance doctrine would have relevance, it was suggested, where initial negligence is clearly separate from subsequent negligence.

law, a person who satisfied a shared contractual obligation was entitled to seek contribution (or indemnity) from the others who shared liability with him. A person who satisfied a shared obligation arising in tort, however, was not entitled to contribution.

4. THE *NEGLIGENCE ACT*

(a) Reform of the Common Law

The common law governing shared liability arising in tort has been altered by legislation. In British Columbia, the *Negligence Act*[2] provides that liability to make good damage is proportional to the degree in which each person contributed to the damage or loss, and that persons who share liability have a statutory right to contribution.[3]

(b) Reform of the Negligence Act

Various problems arising from the procedural and substantive aspects of the law that governs shared liability arising in contract or tort remain. For example, shared liability need not necessarily derive from a common legal basis. One of the persons might be liable in tort and another in contract or by reason of a breach of a statutory duty. There is some doubt whether, in these circumstances, liability can be apportioned and whether those causing the damage enjoy rights of contribution. This and other aspects of shared liability are examined in this Report.

(c) The Uniform Contributory Fault Act

The Uniform Law Conference of Canada has recently adopted a *Uniform Contributory Fault Act*,[4] which is the culmination of a number of years of work. Many of the problems experienced in British Columbia are resolved by the Uniform Act. In the following discussion of joint and several liability, contributory negligence and contribution, the provisions of the Uniform Act will be considered. An issue which will be addressed later in this Report is whether the Uniform Act should be adopted in British Columbia.

B. A Note on Terminology

Articles in legal journals tend to distinguish between kinds of shared liability based upon the context in which they arise. Shared liability in contract is treated separately from shared liability in tort. That approach implies that the manner in which shared liability arises is of more significance than its consequences. And yet, the consequences of shared liability tend to be uniform, independent of the manner in which it arises. For that reason, the discussion in this Report is of shared liability generally, and distinctions peculiar to shared liability in contract or in tort are treated as exceptions to the general principles which apply.

C. The Working Paper

A Working Paper on Shared Liability (W.P. 50) was published in May 1985. This was given wide circulation, but failed to elicit significant response. Points raised in submissions we received are referred to later in this Report.

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[2] R.S.B.C. 1979, c. 298.
[3] *Ibid.*, s. 1.
[4] Uniform Law Conference of Canada, *Consolidation of Uniform Acts* (April 1985, 7A-1). See Appendix A to this Report.

CHAPTER II

JOINT LIABILITY AND JOINT AND SEVERAL LIABILITY

A. Introduction

1. Separate and Shared Liability

Liability to another may arise by agreement or by operation of law. It may be separate or shared.

Separate liability is referred to as "several" in the sense that the fault of a person for loss or damage is distinct or severable from the fault of anyone else. A person who is severally liable is independently responsible for another's loss or damage. Two or more persons may make independent promises to another or may be separately responsible for causing different injuries to another. In either case, liability to the injured person or to the person to whom the promises were made is separate. For example, if A and B each separately promise to pay C ten dollars, each is liable to pay C ten dollars. If the promises are kept, C will receive $20. Several liability is cumulative.

Where two or more persons promise to do the same thing or are responsible for a common injury to another, they share liability to perform the promise or compensate for the injury. The obligation is indivisible. Performance by one will discharge the other or others, since they cannot be called upon to repeat the performance of the obligation. Shared obligations are not cumulative.

The common law recognizes two kinds of shared liability: joint liability and joint and several liability. Different rules apply, depending on the characterization of shared liability.[1] The chief distinction between the two kinds of shared liability is procedural. If liability is joint, the plaintiff must usually proceed against all who share liability in the same proceeding. If liability is joint and several, the plaintiff may elect to proceed against defendants separately. In this chapter, we examine the distinctions between joint liability and joint and several liability, together with the differing rules that apply to discharge of shared liability depending on its characterization.

2. Characterizing the Nature of Liability

It is not always clear whether shared liability is joint or joint and several.

The characterization of liability which arises consensually is one of construction. A promise made by two or more persons is usually presumed to be joint unless it is qualified.[2] What constitutes qualification is, however, a question of interpretation.[3] Liability for overdrafts on a joint bank account, for example, is not necessarily joint. It depends upon the terms of the contract and the nature of the dealings with the bank.[4]

In some cases the characterization of shared contractual liability is dealt with by statute. The *Partnership Act*[5] provides that partners are jointly liable for partnership debts and obligations. The *Bills of Exchange Act*[6] provides that

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[1] *See generally*, Guest, ed., *Chitty on Contracts*, vol. 1, ch. 17 (24th ed. 1977); Treitel, *The Law of Contract*, 517 *et seq.* (3rd ed. 1970).

[2] *White* v. *Tyndall*, (1888) 13 A.C. 263 (H.L.); *see also Bennett* v. *Fraser*, [1936] 2 W.W.R. 616 (B.C.S.C.); *Robert Porter & Sons Ltd.* v. *Armstrong*, [1926] S.C.R. 328.

[3] *See* Treitel, *supra*, n. 1 at 517. In *Harvey* v. *Towns Ltd.* [1946] 4 D.L.R. 160 (S.C.C.), for example, it was held that a covenant in a contract providing that A and B "do and each of them. . . promise and agree" was a joint and several promise. In *Robert Porter & Sons Ltd.* v. *Armstrong*, *ibid.*, it was held that a promise by covenantors that "they will pay" created only a joint liability; *see also Geisler and Fraser* v. *Shields and Shields*, (1983) 45 B.C.L.R. 23 (B.C.S.C.).

[4] *Bank of Montreal* v. *Vaillancourt*, (1983) 22 B.L.R. 52, 42 O.R.(2d) 545 (Ont. C.A.).

[5] R.S.B.C. 1979, c. 312, s. 11; *cf. Geisler*, *supra*, n. 3, where spouses in a joint venture were characterized as partners and jointly and severally liable.

[6] R.S.C. 1970, c. B-5, s. 179(2).

where two or more persons sign a promissory note which bears the words "I promise to pay" the obligation is deemed to be joint and several.[7]

The *Negligence Act*[8] provides that shared liability in tort is joint and several. Recently, however, it was held that where the injured person is contributorily negligent, liability is only several.[9]

B. Principles of Shared Liability

1. Principles Common to Both Joint Liability and Joint and Several Liability

(a) Defence of One Person Liable

If one person has a personal defence, (for example, a defence based on his minority) the others who share liability with him may not take advantage of it.[10] If one person has a defence which goes to the root of the plaintiff's claim, the others who share liability with him, although they have not pleaded it, may take the benefit of it.[11]

Special rules apply to contracts of guarantee under which the guarantor usually undertakes joint and several liability with the principal debtor. The Commission examined these special rules in *Report on Guarantees of Consumer Debts*.[12]

(b) Release of One Person Liable

Actions or aspects of actions may be settled before trial. The plaintiff may accept payment or performance from a defendant in satisfaction of his claim, or he may abandon his claim. Frequently the defendant will require an assurance from the plaintiff that the plaintiff will not later proceed against him on the settled matter. An assurance of that kind may take one of two forms. It may constitute a "release" under which the plaintiff acknowledges that the defendant is not, or is no longer, liable to him with respect to the settled matter. Or it may take the form of a "covenant not to sue" which provides that the plaintiff agrees not to sue or continue an action against the defendant with respect to the settled matter, but does not address the issue of liability. Lord Denning M.R. has described the distinction between the two as arid and technical, without any merit.[13] The distinction, however, has significant consequences.

A release of one person discharges others who share liability with him.[14] On the other hand, a covenant not to sue a person does not discharge the others with whom he shares liability.[15] A release which reserved the plaintiff's rights

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[7] *See also, Forest Act*, R.S.B.C. 1979, c.140, s.143; *Company Act*, R.S.B.C. 1979, c. 59, ss. 14, 43, 151; *Negligence Act*, R.S.B.C. 1979, c. 298, ss. 1, 4.

[8] R.S.B.C. 1979, c. 298, ss. 1 and 4.

[9] *Leischner* v. *West Kootenay Power and Light Co. Ltd.*, (1983) 45 B.C.L.R. 204 (B.C.S.C.) *aff'd.* on this point (1986) 70 B.C.L.R. 145 (B.C.C.A.); *Cominco Ltd.* v. *Canadian General Electric Co. Ltd.*, (1983) 50 B.C.L.R. 145 (B.C.C.A.).

[10] In *Pirie* v. *Richardson*, [1927] 1 K.B. 448 (C.A.) three partners were sued on a contract. Each filed a separate defense. Only one partner raised the defence that the plaintiff had not complied with the terms of the contract. That defence was successful, and it was held that it enured to the benefit of the other co-defendants.

[11] *Ibid. See also Phillips* v. *Ward*, (1863) 2 H. & C. 717, 159 E.R. 297.

[12] (LRC 43, 1979).

[13] *Bryanston Finance Ltd.* v. *de Vries*, [1975] 2 All E.R. 609 (C.A.).

[14] *North* v. *Wakefield*, (1849) 13 Q.B. 536, 116 E.R. 1368; *Re E.W.A.*, [1901] 2 K.B. 642 (C.A.); and *see Gurney* v. *Braden*, (1894) 3 B.C.R. 474 (B.C.S.C.F.C.); *Lugsdin* v. *Ball*, [1929] 4 D.L.R. 543 Ont. (C.A.); *Nicholson* v. *Revill*, (1836) 4 A.D. & E. 675, 111 E.R. 941 (contract); *Duck* v. *Mayeu*, [1892] 2 Q.B. 511 (C.A.) (tort); *Reaney* v. *National Trust Co.*, [1964] 1 O.R. 461 (Ont. H.C.); *Toronto Dominion Bank* v. *Higgott*, (1984) 48 O.R. (2d) 708 (Ont. H.C.). Neither a discontinuance nor a dismissal for want of prosecution constitute a release: *Waugh-Milburn Construction Co.* v. *Slater*, (1913) 48 S.C.R. 609; *Re Urquhart and Hatt*, (1982) 132 D.L.R. (3d) 685 (Ont. Co. Ct.); *see, however, North West Life Assurance Co. of Canada* v. *Shannon Height Developments Ltd.*, (1986) 37 A.C.W.S. (2d) 255 (B.C.S.C.); *Deslauriers* v. *Ginn*, [1986] B.C.D. Civ. 2240-01 (S.C.).

[15] *Hutton* v. *Eyre*, (1815) 6 Taunt. 289, 128 E.R. 1046; *Duck* v. *Mayeu*, *ibid.*; *Apley Estates Co. Ltd.* v. *De Bernales*, [1947] 1 Ch. 217 (C.A.); *Cutler* v. *McPhail*, [1962] 2 Q.B. 292, at 298.

against persons who shared liability with the person released has been construed as a covenant not to sue.[16]

2. Principles Which Differ

(a) Joinder of Parties

(i) Joint Liability

A joint obligation is only one obligation. At common law, as a general rule all persons jointly liable had to be joined as defendants and process served on them.[17] A person who was jointly liable could apply for a stay of proceedings until the others jointly liable were joined in the proceedings and served with process.[18] There are exceptions to the general rule.[19] For example, a person jointly liable with others need not be joined if he is outside the jurisdiction,[20] his promise is void or voidable by reason of his minority,[21] he is a member of a firm of common carriers,[22] or he is an undisclosed partner of one who represented himself as being the sole contracting party.[23]

The court now has a discretion in the matter.[24] A stay might be refused, for example, when the plaintiff has done all in his power to effect service on an absent defendant.[25] Moreover, the *Law and Equity Act*[26] now provides that:

> **48.** (1) Where a party has a demand recoverable against 2 or more persons jointly liable it is sufficient if any of the persons is served with process, and an order may be obtained and execution issued against the person served notwithstanding that others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.

(ii) Joint and Several Liability

Separate actions may be brought against persons jointly and severally liable.[27] The court may, however, order joinder of other persons who share liability if their participation is necessary in the proceedings.[28]

(b) Death of a Person Who Shares Liability With Others

(i) Joint Liability

Liability of a person jointly liable with others passes on his death to the survivors who shared the liability with him.[29] His estate is freed of that

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[16] *Solly* v. *Forbes*, (1820) 2 Brod. & Bing. 38, 129 E.R. 871; *Rice* v. *Reed*, [1900] 1 Q.B. 54 (C.A.); *Castle* v. *Bilsky*, (1921) 50 O.L.R. 536 (H.C.); *R.N. Johnston & Co.* v. *Finkleman*, (1926) 37 B.C.R. 95 (B.C.C.A.); *Gardiner* v. *Moore*, [1969] 1 Q.B. 55. In *Bank of Hamilton* v. *Copp*, (1924) 3 W.W.R. 323 (B.C.S.C.) it was held that parol evidence to show the creditor intended to reserve his rights was inadmissible. In *Heller-Natofin (Western) Ltd.* v. *Bender*, (1984) 28 A.C.W.S. (2d) 326 (Man. C.A.) it appears that a release which did not waive rights against others sharing liability was characterized as a covenant not to sue.

[17] *Lamb* v. *Lasby*, (1913) 3 W.W.R. 1139 (Sask. S.C.); *Cabell* v. *Vaughan*, (1669) 1 Wms. Saund. 298, 85 E.R. 386; *Corbett* v. *Calvin*, (1847) 4 U.C.R.Q.B. 123; *Norbury Natzio & Co. Ltd.* v. *Griffiths*, [1918] 2 K.B. 369 (C.A.); it is up to the defendant to take the point, *Wegg Prosser* v. *Evans*, [1895] 1 Q.B. 108 (C.A.), and if he does not the proceedings cannot be defeated as a result of the non-joinder. B.C. Rules of Court, R. 5(9); *see also Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 48(1).

[18] At common law if the plaintiff failed to join all the joint contractors as defendants they (or any one of them) could plead the non-joinder by plea of abatement. The defendant can now apply under R. 5(4) of the B.C. Rules of Court to have the proceedings stayed until his co-contractors are joined pursuant to R. 15(5)(a)(ii) and (iii) of these Rules. It has been said that an application by a joint promisor to have his co-promisors joined ought to be granted or refused on the same principles as those on which a plea of abatement would have succeeded or failed at common law: *see, e.g., Erickson* v. *The Preferred Accident Insurance Co. of New York*, (1928) 40 B.C.R. 241 (B.C.C.A.) A plea of abatement was a plea by which the defendant, while not denying the cause of action alleged by the plaintiff, pleaded that on some ground not going to the cause of action the plaintiff ought not to be allowed to proceed.

[19] *See generally*, 9 *Halsbury's Laws of England*, 4th ed., para. 617.

[20] *Wilson, Sons & Co., Ltd.* v. *Balcurres Brook Steamship Co., Ltd.*, [1893] 1 Q.B. 422 (C.A.).

[21] *Gibbs* v. *Merrill*, (1810) 3 Taunt 307, 128 E.R. 122.

[22] *Carriers Act*, R.S.B.C. 1979, c. 43, s. 5.

[23] Chitty, *supra*, n. 1, para. 1073.

[24] *Beisel* v. *Negus*, [1948] 2 W.W.R. 492 (B.C.S.C.); *Nolan* v. *Hallett & Carey Ltd. (No.2)*, [1948] 2 W.W.R. 937 (Man. K.B.); *Adelson* v. *W.E. Sherlock Co. Ltd.*, (1954) 12 W.W.R. 252 (B.C.S.C.).

[25] *Robinson* v. *Giesel*, [1894] 2 Q.B. 685 (C.A.).

[26] R.S.B.C. 1979, c. 224.

[27] *Cabell* v. *Vaughan*, *supra*, n. 17.

[28] B.C. Rules of Court, R. 15(5)(a)(ii) and (iii); *see Daco Developments Ltd.* v. *Norman Lewis Co. Ltd. (False Creek Electric Ltd.)*, *Haig and Dudulec*, (1982) 33 B.C.L.R. 273 (B.C.C.A.).

[29] *Supra*, n. 2.

liability. Liability of the last person jointly liable passes to his estate. When there is no one else to share liability, it necessarily becomes several. At that time, the rules governing joint liability no longer have any relevance.[30]

The common law has been altered insofar as partners are involved. The *Partnership Act*[31] provides that, although partners are jointly liable for partnership debts, the estate of a deceased partner is severally liable, subject to the prior payment of his separate debts.[32]

(ii) Joint and Several Liability

Liability of a person jointly and severally liable with others passes to his estate on his death.[33]

(c) Judgment Against One Person Who Shares Liability With Others

(i) Joint Liability

At common law, judgment against one or more persons jointly liable with others bars any subsequent action against the others.[34] That is so even if the plaintiff was unaware of the existence of other persons who shared liability with the defendants and the judgment is not satisfied.[35]

The common law position has been altered by the *Law and Equity Act*,[36] which provides as follows:

> **48.** (2) The obtaining of an order against any one person jointly liable does not release any others jointly liable who have been sued in the proceeding, whether the others have been served with process or not.

This section does not accomplish very much. Even before enactment of section 48 of the *Law and Equity Act*, the Supreme Court Rules offered some relief from the consequences of the common law rule. The Supreme Court Rules provide, for example, that judgment for a liquidated sum in default of appearance[37] or defence[38] does not prejudice the plaintiff's right to proceed against others jointly liable who have entered an appearance or delivered a defence.[39] Similarly, summary judgment against one person does not prejudice the plaintiff's right to proceed against others jointly liable who obtained leave to defend.[40] Section 48(2) of the *Law and Equity Act* is not restricted to liquidated demands and, therefore, does go slightly further than the Supreme Court Rules.

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[30] *Calder* v. *Rutherford*, (1822) 3 Brod. & B. 302, 129 E.R.1301.

[31] *Supra*, n. 5, s. 11.

[32] *Ibid.* It seems that this section merely confirms a rule in equity that partnership debts were to be treated as joint and several to the extent that they could be enforced against the estate of a deceased partner, *see* Treitel, *supra*, n. 1, at 521-522. *See also* s. 121 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114.

[33] *Read* v. *Price*, [1909] 1 K.B. 577; and *see Harvey* v. *Towns Ltd.*, *supra*, n. 3.

[34] *Kendall* v. *Hamilton*, (1879) 4 A.C. 504 (H.L.); *King* v. *Hoare*, (1844) 13 M. & W. 494, 153 E.R. 206.

[35] *Ibid. See also Hudson's Bay Co.* v. *Scott*, [1929] 3 W.W.R. 232 (B.C. Cty. Ct.). The effect of this rule has been mitigated to some extent by a number of exceptions. For example, where the second action is not in respect of an identical cause of action, the judgment is no bar. *See, e.g., Wegg Prosser* v. *Evans*, *supra*, n. 17, where one of two joint guarantors gave a cheque to a creditor, who recovered judgment on the cheque, and it was held that this judgment was no bar to a later action on the guarantee. Nor does it apply if the defendant in the second action agreed that his liability should remain until that judgment was satisfied; *Duffner* v. *Bowyer*, (1924) 40 T.L.R. 700. Moreover, although partners are liable jointly for the debts of the firm, under the *Partnership Act*, *supra*, n. 5, the estate of a deceased partner is also severally liable: *ibid.* A creditor who obtains judgment against the surviving partners is not precluded from making a claim against the estate of the deceased partner. Under the Supreme Court Rules a partnership can be sued in the firm name: R. 7(1). *See, e.g., Dominion Bank* v. *Paliti et al.*, (1931) 45 B.C.R. 89. A judgment in such an action can be enforced against any partner, unless the leave of the court, which is required to issue execution against a particular partner, is refused: *ibid.*, R. 7 and R. 8; *and see Maynard* v. *Ford Motor Co. of Canada et al.*, (1967) 25 Adv. 169 (B.C.S.C.).

[36] *Supra*, n. 26.

[37] Rule 17(3).

[38] Rule 25(4).

[39] This will only be allowed if the defendants' liability is joint and not alternative, *Fritz Plumbing Co. Ltd.* v. *Guasp and El Bodegon Restaurant Ltd.*, [1972] 1 W.W.R. 692 (Alta. D.C.), applying *Morel Bros. & Co.* v. *Westmorland (Earl of)*, [1904] A.C. 11 (H.L.).

[40] *Ibid.* R. 18(3); *see also Zweig* v. *Morrissey*, (1897) 5 B.C.R. 484.

(ii) Joint and Several Liability

Where shared liability is joint and several, judgment against one does not bar action against others.[41] Only satisfaction of the judgment will discharge others who share liability.[42]

C. Reform

1. Introduction

In the previous discussion, various difficulties and uncertainties have been observed in the law governing shared liability. These include the different results which arise depending upon whether shared liability is joint or joint and several and the effect of a release of, or judgment against, one person on others who share liability with him.

In many respects, there is consistency in the rules governing shared liability arising in contract or tort. Historical distinctions between joint liability and joint and several liability have become blurred. A question which deserves attention is whether any advantage is obtained from continuing to distinguish between different kinds of shared liability.

2. Joint Liability and Joint and Several Liability

The characterization of shared liability determines who the plaintiff must proceed against. If liability is joint, generally the plaintiff must include in the same proceeding all persons jointly liable to him, although the court has some discretion in this matter. Death of one person jointly liable with others relieves his estate of liability. Judgment against one person jointly liable with others relieves them from liability (although they may be required to indemnify the person who has satisfied the plaintiff's claim). Joint liability is only one liability shared by two or more people. It is not divisible, and these consequences flow from that quality.

If liability is joint and several, the position is different in several respects. The plaintiff may proceed against one, some or all of the persons who share liability to him. Liability of a person jointly and severally liable passes to his estate. Judgment against one person jointly and severally liable with others does not relieve them of liability. Joint and several liability is one liability shared by two or more people, which is divisible.

Technical problems presented by joint liability have tended to be resolved by paralleling joint liability with joint and several liability. As we mentioned earlier, the general rule that all persons jointly liable must be included in the same proceeding is now subject to judicial discretion. That position is not significantly different from permitting a plaintiff to proceed against selected persons who are jointly and severally liable, subject to the court's discretion to require others jointly liable with the defendant to be joined.

(a) Effect of Death on Joint Liability

Legislative changes to the common law rule that liability of a person jointly liable with others passes to them on his death and not to his estate is a good example of the trend to parallel joint liability with joint and several liability. The British Columbia *Partnership Act* provides that on the death of a partner his joint liability passes to his estate. The common law rule with

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[41] *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Minneapolis-Honeywell* v. *Irvine*, (1953) 11 W.W.R. 212 (B.C.S.C.); *Campbell Flour Mills Co. Ltd.* v. *Bowes*, (1914) 32 O.L.R. 270 (Ont. C.A.).

[42] If a creditor obtains something from one joint debtor he must bring this into account before suing the others: *Advance Rumely Thresher Co. Inc.* v. *Bain*, [1920] 3 W.W.R. 840 (Sask. C.A.).

respect to all joint obligations was abolished in Ontario in 1837.[43] In 1925, abolition of the rule with respect to contractual obligations was recommended by the (U.S.) Commissioners on Uniform State Laws.[44] They recommended:[45]

> On the death of a joint obligor in contract, his executor or administrator [or estate] shall be bound as such jointly and severally with the surviving obligor or obligors.

(b) Judgment Against One Person Jointly Liable

At common law, where two or more persons are jointly liable, judgment against one, although unsatisfied, releases the others from their obligation.

This rule has been abolished for joint obligations arising in tort in England[46] and in other provinces.[47] It is still assumed to be in force in British Columbia.[48]

The (English) Law Commission[49] and the (U.S.) Commissioners on Uniform State Laws[50] have each recommended that the rule should also be abolished for joint obligations arising in contract. The (English) Law Commission recommendation was implemented in 1978.[51]

These changes would bring the law governing joint obligations into step with that which governs joint and several obligations.

3. Recommendation

It is difficult to see what advantages are obtained from characterizing shared liability as being either joint or joint and several. If the plaintiff's remedies were confined to the joint property of persons jointly liable, the distinction might derive some logical support. The liability of persons involved in a joint venture would be analogous to that of a single entity, such as a corporation. The plaintiff's remedies, however, are not confined to the joint property of persons jointly liable. What reasons, then, led to the creation of the concept of joint liability?

It has been suggested that the different characterizations of shared liability were the creation of the common law, dependent upon rules derived from real property law, to determine necessary parties to litigation as well as to avoid complex and multiple actions:[52]

> Conceptually, this all-inclusive and mutually exclusive classification of shared rights and obligations was undeniably ingenious . . . .[I]dentification of the participant's resulting rights and duties under the substantive law as "joint" or "joint and several" or "several" dictated the procedural mode for enforcement of those rights and liabilities.
>
> The most immediate and recognizable procedural consequence was in the area of joinder of parties, where the classification of shared rights and obligations largely created the concepts and fixed the parameters of "necessary" and "proper" parties. The procedural impact, however, affected and controlled all stages of actions involving shared rights and liabilities, from the nature and modes for acquisition of the jurisdiction required over the participants and the substance and form of the pleadings to the enforceability and estoppel effect of the judgment rendered.

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[43] S.U.C. 1838, 1 Vict., c. 7, s. 1; *see also Mercantile Law Amendment Act*, R.S.O. 1980, c. 265, s. 4; *Mercantile Law Amendment Act*, R.S.M. 1970, c. M120, s. 7.

[44] *Uniform Joint Obligations Act*, National Conference of Commissioners on Uniform State Laws, 1925.

[45] *Ibid.* s. 6.

[46] *Law Reform (Married Women and Tortfeasors) Act, 1935*, (U.K.), 25 & 26 Geo. 5, c. 30; *see* now the *Civil Liability (Contribution) Act, 1978*, (U.K.), 1978, c. 47, s. 3.

[47] *See, e.g., The Tort-Feasors Act*, R.S.A. 1980, c. T-6; *The Tortfeasors and Contributory Negligence Act*, R.S.M. 1970, c. T-90; *Tortfeasors Act*, R.S.N.B. 1973, c. T-8; *Tortfeasors Act*, R.S.N.S. 1967, c. 307.

[48] *Reichl and Weisz* v. *Rutherford-McRae Ltd. et al.*, (1965) 51 D.L.R. (2d) 332, 335 *per* Munroe J. (B.C.S.C.).

[49] The Law Commission, *Law of Contract Report on Contribution*, (1977) Law Com. No. 79, para. 35.

[50] *Supra*, n. 44, s. 2.

[51] *Civil Liability (Contribution) Act, 1978*, (U.K.), 1978, c. 47, s. 3.

[52] Donald J. Werner, "Shared Liability: An Alternative to the Confusion of Joint, Several, and Joint and Several Obligations," (1977) 42 Alb. L. Rev. 1, 2-3.

> The impetus for the common law evolution of the concepts themselves, as a feature of the substantive law, was undoubtedly historical. The view that those who shared a community of right or obligation were, in Williston's words, "together bound as if they were a single person" most likely derived from the common law doctrine that the grant of an estate in real property to two or more persons created a joint tenancy rather than a tenancy in common, unless an intent to create the latter was clearly expressed.
>
> With respect to the procedural consequences of the classification, logic also played a part. To a developing legal system, the classification became, in conjunction with the limitation of subject matter imposed by the writ system and the forms of action, a valuable means of avoiding overly complex litigation with multifarious parties and issues by insuring that those on each side of the adversarial boundary shared identical interests in the subject matter of the suit.

These are functions which the courts perform adequately under the Supreme Court Rules. It would appear, consequently, that the concept of joint liability, as opposed to joint and several liability, no longer has any justification. Rather than retain the concept of joint liability, modified so that it corresponds to joint and several liability, it is our conclusion that all shared liability should be characterized as joint and several.[53]

The Commission recommends that:

1. The Law and Equity Act *be amended by adding a provision comparable to the following:*

Where two or more persons are, but for this section, jointly liable to satisfy a common obligation, their liability is deemed to be joint and several.

Under the current British Columbia *Negligence Act*, where damage or loss has been caused by the fault of two or more people, they are jointly and severally liable.[54] This section does not do away with many problems posed by joint liability, since the word "fault" is open to a variety of interpretations. How broad a definition is desirable depends on issues arising with respect to contribution, and these are addressed later in this Report.

One submission on the Working Paper was critical of the recommended approach. It was observed, first, that inferior courts not subject to the Supreme Court Rules might encounter difficulties in controlling necessary parties to litigation and avoiding complex and multiple actions. This objection is based more on theory than practice. We are unaware of a modern case in which the concept of joint liability has proved useful to limit the number of parties to a proceeding. Our conclusion is that the nature and consequences of shared liability need not alter in order to determine necessary parties to a proceeding, and the concept of joint liability is unnecessary for that purpose. Problems of courts not subject ot the Supreme Court Rules in controlling necessary parties to litigation are unlikely to be exacerbated by this amendment to the law. The concern that multiple actions might result from implementation of Recommendation 1 is addressed in the next section of this Report.

It was also observed that the plaintiff may be the only one who knows who may be liable to him. Unless he is forced to sue all parties in the same proceeding:

> . . . he may pick and choose among defendants, or worse still, sue them separately in different actions and different registries and recover several times over.

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[53] The Saskatchewan Law Reform Commission has recently recommended a similar approach with respect to consensual joint liability: *Proposals Relating To Joint Obligations* (June, 1985). They recommend at 18 that "All co-promises should be treated as creating joint and several obligations, and not joint obligations." *See also*, Glanville Williams, *Joint Obligations*, (1949), at 3: "What is needed is that joint liability as a legal conception should cease to exist, and that every obligation now read as joint should be read as joint and several."

[54] *Supra*, n. 8, s. 4.

There is no means of preventing an unscrupulous plaintiff from proceeding in that manner, if the parties do not have knowledge of persons jointly liable with them. Section 48 of the *Law and Equity Act* currently permits a plaintiff to bring separate proceedings against persons who are jointly liable. Legislation implementing Recommendation 1 would not make it any easier for plaintiffs to conduct themselves fraudulently. If the parties are aware of the plaintiff's fraudulent actions, the courts can provide a satisfactory remedy whether or not they are subject to the Supreme Court Rules.[55]

4. Rules to Reduce Multiple Actions

The law governing joint liability tends to restrict the potential for litigation, since joint defendants, as a rule, have to be joined in the same action. On the other hand, it is open to a plaintiff to proceed against defendants who are jointly and severally liable to him in several actions.

In order to reduce the potential for multiple proceedings, the (English) *Law Reform (Married Women and Tortfeasors) Act, 1935*[56] provided that a plaintiff proceeding in separate actions against joint tortfeasors may not recover a higher sum by execution than had been awarded in the first action. Moreover, the plaintiff could not recover costs of subsequent actions unless he satisfied the court that there was good reason for bringing more than one action. These controls on costs and damages have both been adopted in the *Uniform Contributory Fault Act*.[57]

The English Law Commission recently considered whether these controls on multiple actions were necessary and concluded that the restriction on costs should be retained. Restricting the level of damages to that awarded in the first action, however, was undesirable. The amount of damages recoverable in the first action, for example, might be limited. It would seem odd that a person with unlimited liability should benefit from the fact that judgment was first obtained against one whose liability was limited. These recommendations were adopted in the English *Civil Liability (Contribution) Act, 1978*.[58]

The *Uniform Contributory Fault Act*[59] took a slightly different approach on the issue of the assessment of damages in subsequent proceedings. Section 16 of the Uniform Act provides:

> **16.** (1) Where a judgment determines the total liability for damages of concurrent wrongdoers in an action against one or more of them, the person suffering the damage is not entitled to have the total liability determined in a higher amount by a judgment in the same or any other action against any other concurrent wrongdoer.

This approach would seem to adequately address the concern of the English Law Commission with respect to a prior damage assessment that was limited in some way by a defence personal to a defendant. An assessment of total liability for damages would be binding on the plaintiff, although it would be open to a subsequent defendant to establish that damages should be assessed in a lower amount.

One point of concern with the drafting of s. 16(1) of the Uniform Act is the reference to "total liability for damages." It suggests that a finding with respect to the *liability* of concurrent wrongdoers not joined in the proceedings, rather than an assessment of the whole of the plaintiff's *damages*, may be

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[55] For example, seeking identical relief in two separate actions is an abuse of process: *see Paterson* v. *Jaikumar*, (1979) 10 B.C.L.R. 48 (B.C.S.C.); *Great Pacific Contracting Ltd.* v. *Harwyn Properties*, (1981) 29 B.C.L.R. 145 (B.C.S.C.); *Acme Masonry Ltd.* v. *Bird Construction Co. Ltd.*, [1985] B.C.D. Civ. 3560-02 (B.C.S.C.).

[56] *Supra*, n. 46.

[57] S. 16. The Uniform Act was adopted by the Uniform Law Conference of Canada in 1984; the Uniform Act is to be found in Appendix A to this Report.

[58] *Supra*, n. 51.

[59] *Supra*, n. 57.

binding on the plaintiff. In our view, a plaintiff should be able to proceed against unjoined defendants in subsequent proceedings even if their liability was addressed in a prior judgment. Section 16(1) should be recast as follows:

> A person who receives a judgment against a concurrent wrongdoer in which the whole of his damages is assessed, is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer.

While legislation can usefully clarify the assessment of damages in multiple proceedings, we doubt whether there is a need for legislation on costs in these circumstances. Under the British Columbia *Negligence Act*, the ability to proceed against joint tortfeasors separately has not led to a proliferation of actions. Moreover, the courts retain their discretion over costs. If a subsequent action against a person who shares liability with others proves to have been an unnecessarily costly procedure, costs may be refused, or even awarded against the plaintiff. It is our conclusion that it is unnecessary to adopt a specific sanction on costs to control multiple actions against persons sharing liability. Comment we received on this issue agreed with this approach.

The Commission recommends that:

2. *A person who receives a judgment against a concurrent wrongdoer in which the whole of his damages is assessed, is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer.*

A. Introduction

When a person who suffers injury to his person or property is partly responsible for causing or failing to avoid the injury, he is said to be "contributorily negligent." At common law, when the person who suffered loss or injury and another were both negligent, liability fell upon the person who was the real cause of the accident, the person who had the "last clear chance" to avoid it. The common law was unprepared to apportion responsibility for loss or injury.

Most jurisdictions have altered this aspect of the common law. In British Columbia, the *Negligence Act*[1] provides that loss is apportioned among the persons contributing to it in proportion to the degree each person was at fault:

> **Apportionment of liability for damages**
>
> **1.** Where by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that
>
> (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
>
> (b) nothing in this section shall operate so as to render a person liable for damage or loss to which his fault has not contributed.

Until recently, it was generally assumed that under the *Negligence Act* each person contributing to the plaintiff's loss or injury was jointly and severally liable to compensate the plaintiff for that loss or injury.[2] The amount of compensation was determined by assessing damages less the portion due to the plaintiff's contributory negligence. Each person contributing to the plaintiff's loss was responsible for that entire amount, but entitled to contribution from others who shared liability according to their respective degrees of fault.

In *Leischner et al.* v. *West Kootenay Power and Light Company Limited et al.*,[3] it was held that where a plaintiff is found to be contributorily negligent, each defendant is responsible only for that portion of the loss which corresponds to his degree of fault. That position was confirmed by the British Columbia Court of Appeal in *Cominco Ltd.* v. *Canadian General Electric Company Limited*.[4] If a plaintiff is contributorily negligent, the defendants are severally, not jointly, liable. Liability is apportioned, but not shared.

That result appears to be dictated by section 1 of the *Negligence Act* when read in conjunction with section 2(c), which provides as follows:

> **2.** The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions:
>
> (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person;

Leischner was appealed.[5] A five member panel of the British Columbia Court of Appeal heard the appeal in order to consider the correctness of its

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[1] R.S.B.C. 1979, c. 298.

[2] *Quinlan* v. *Nordlund*, (1961) 27 D.L.R. (2d) 162 (B.C.S.C.); that result is also obtained by similar legislation in other jurisdictions: *see, e.g., Fellows* v. *Majeau*, [1945] 2 W.W.R. 113 (Alta.S.C.); *Ward* v. *The Queen*, [1954] Ex. C.R. 185 (Ont.); *Sargent* v. *Canadian Coachways Ltd.*,[1951] 1 D.L.R. 609 (Alta.C.A.); *Menow* v. *Honsberger et al*, [1970] 1 O.R. 54 *aff'd*. [1971] 1 O.R. 129, *aff'd*. [1974] S.C.R. 239.

[3] (1983) 45 B.C.L.R. 204 (B.C.S.C.).

[4] (1983) 50 B.C.L.R. 145 (B.C.C.A.); *see also Kinleson* v. *Hertel*, [1984] B.C.D. Civ. 3079-01 (B.C.S.C.). In *Uyeyama* v. *Wittenberg*, (1985) 60 B.C.L.R. 387 (B.C.S.C.), currently under appeal, the plaintiff's failure to wear a seatbelt constituted contributory negligence. The argument that the plaintiff's fault was not contributory in the sense that it would have prevented the loss or injury from arising was rejected. The co-defendants were severally liable.

[5] (1986) 70 B.C.L.R. 145 (B.C.C.A.).

conclusion in *Cominco*. It was held that the plaintiff had not been contributorily negligent. With respect to the *Cominco* decision, it was held that:

> Even though the liability of the plaintiff is not a factor for the reasons we have given, we have concluded that we should confirm as correct the view of the trial judge in this case, and of this Court in the *Cominco* case on the proper application of the *Negligence Act*.

B. The Significance of Joint Liability Under the Negligence Act

When defendants are jointly liable, the plaintiff is not concerned with how liability is apportioned among them. If an award is made in favour of the plaintiff, each of the defendants is responsible for the whole amount. If the plaintiff recovers the whole amount from one defendant, that defendant is faced with the problem of recovering contribution or indemnity from others who share his liability in accordance with their respective degrees of fault.

If the plaintiff is blameless for loss or damage he has suffered, that approach is eminently sensible. He should be compensated. It is not the plaintiff's concern whether each of those who share liability are able to pay the share of damages determined by their respective degrees of fault. If, for example, one of the defendants is insolvent, that misfortune falls on the other defendants, not on the plaintiff. They must make good any shortfall caused by the inability of a co-defendant to pay his share.

The burden of any shortfall is not necessarily shared equally by the solvent defendants, nor divided in accordance with their respective degrees of fault. The law provides no mechanism for apportioning the shortfall. Sometimes a defendant whose percentage of fault is minimal will have to bear the burden of the whole award, or a disproportionate share of the burden. It may seem unfair that a defendant who is only 10% responsible for another's loss should pay 100% of the damages because the defendant who was 90% responsible is insolvent (or cannot be found or is otherwise unavailable or unable to satisfy the judgment). From the perspective of the blameless plaintiff, however, it is fair that he be compensated.

When the plaintiff contributes to his own damage or loss, however, the equities between the parties are altered. An example is useful at this point.

> P (Plaintiff) is found 40% responsible (contributorily negligent) for his damages. D1 (Defendant 1) is found to be 59% at fault. D2 (Defendant 2) is 1% at fault. Damages are assessed at $100,000. P is entitled to recover $60,000 ($100,000 less the portion for which he is responsible).
>
> Variation 1: If the defendants are jointly and severally liable P may look to either D1, D2 or both of them to recover the $60,000. D2 (who was 1% to blame) may be required by P to pay him $60,000. D2 may look to D1 for contribution. If D1 is, for example, insolvent, D2 will bear the entire burden of the award.
>
> Variation 2: If the defendants are severally liable only, P looks to D1 to recover $59,000 and to D2 to recover $1,000. If either D1 or D2 is unable to pay the portion of the award for which they are responsible, the shortfall is borne by P.

Either approach may, depending on the circumstances, result in injustice.

In *Leischner*, Spencer J. made the following observations:[6]

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[6] *Supra*, n. 3 at 209-10.

> Our legislature has apparently made a choice between two different ways of working out the problems of liability. Where a plaintiff is blameless it provides by s. 4 of the *Negligence Act* that he gets joint and several judgment against any number of defendants responsible for his loss. Where a plaintiff shares in the blame, under s. 1 he gets several judgments against each other defendant liable for his loss. The legislature having chosen to apply the different rules to the different situations, the court's duty is simply to apply them as directed by the statute.

When a plaintiff is contributorily negligent, joint liability may operate unfairly.[7] We do not believe, however, that placing the burden of a shortfall in compensation on the plaintiff is an adequate remedy to that unfairness, which is the result of severing liability in the event the plaintiff is contributorily negligent. An option that might operate more evenhandedly is to apportion responsibility for the shortfall among the parties in the same manner as liability for the loss or damages.

C. Alternative Approaches to Apportionment

At common law, shared liability arising in tort was not apportioned among the wrongdoers. A person who satisfied a shared obligation was not entitled to contribution. A person who suffered damages recovered his loss from one or more of the wrongdoers as he might elect, unless he was contributorily negligent. If the person who suffered damage was contributorily negligent, usually he was unable to recover.

Jurisdictions which have rejected the common law position on contributory negligence have either, in special circumstances, made negligence irrelevant (no fault) or adopted a system of comparative negligence. British Columbia, like England and most other commonwealth jurisdictions, has adopted a system of comparative negligence. Under that system, liability is assessed in proportion to degree of fault.

Different approaches have been adopted toward comparative fault. In some jurisdictions,[8] the injured party's degree of fault does not bar recovery from those who share liability for the injuries. In some American jurisdictions,[9] a 50% system has been adopted. Under that system, the injured person may not recover if his degree of fault was equal to or greater than the negligence of those causing his injuries.

British Columbia and most other Commonwealth jurisdictions have rejected a 50% system. The theory underlying a 50% system is that it is unjust to permit a person primarily at fault for his damages to recover from another. That theory is inconsistent with a basic principle of compensation: people are responsible to the degree they are at fault. A 50% system has its roots in the common law, which was unwilling to apportion liability when a person, however minimally, contributed to his own loss.

D. Severing Joint Liability

In British Columbia, the contributory negligence of a person who suffers loss severs what would otherwise be the joint liability of others contributing to that loss. In many respects, that approach to apportioning liability is theoretically attractive.

A plaintiff who contributes to his own loss is in no better position than others who share responsibility for his loss. In a sense, the plaintiff bears the

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[7] The desirability of an "apportioned judgment" where the plaintiff was contributorily negligent had been argued by Glanville Williams, *Joint Torts and Contributory Negligence*, (1951).

[8] England, Mississippi, New York, Rhode Island and Washington and most Canadian jurisdictions.

[9] *See, e.g.*, New Hampshire.

whole of his loss and then seeks contribution from the others who share responsibility for it in proportion to their respective degrees of fault. This approach is analogous to that which governs a person who shares liability with others and satisfies a judgment for that liability. He then claims contribution from those with whom he shares liability in proportion to their respective degrees of fault.

An advantage that flows from this approach is that a person who shares liability with others is responsible only to the extent that he was at fault. The person who suffered loss must recover from each person who contributed to his loss. A disadvantage is that any shortfall is borne by the person who suffered the loss.

E. Apportionment of Shortfall

We are troubled by the possibility that under the current approach a person may have to bear substantially all of the burden of his loss when his contributory negligence was minimal. If the person who suffers loss is not contributorily negligent, apportionment problems also arise. The following examples demonstrate the apportionment problems that may arise. In each case the plaintiff's loss is assessed at $100,000.

Example 1: Liability is apportioned as follows: Plaintiff (P) 10%, Defendant 1 (D1) 30%, Defendant 2 (D2) 60%. D2 is insolvent, D1 pays P $30,000. Under the current law: P is responsible for $10,000 and must bear the $60,000 shortfall.
If the shortfall were apportioned: D1 would be responsible for 3/4 of the shortfall (an additional $45,000). P would be responsible for 1/4 of the shortfall ($15,000).

Example 2: Liability is apportioned as follows: P 40%, D1 10%, D2 50%. D2 is insolvent. D1 pays P $10,000.
Under the current law: P is responsible for $40,000 and must bear the $50,000 shortfall.
If the shortfall were apportioned: D1 would be responsible for 1/5 of the shortfall (an additional $10,000). P would be responsible for 4/5 of the shortfall ($40,000).

Example 3: Liability is apportioned as follows: P 0%, D1 10%, D2 30%, D3 60%. D3 is insolvent. P recovers $100,000 from D1. D1 seeks contribution from D2.
Under the current law: D1 can recover $30,000 from D2. The shortfall of $60,000 arising from the insolvency of D3 falls on D1.
If the shortfall were apportioned: D2 would be responsible to contribute 3/4 of the shortfall (an additional $45,000). D1 would be responsible for $10,000 of the loss and 1/4 of the shortfall (an additional $15,000).

With this problem in mind, the *Uniform Contributory Fault Act*[10] provides as follows:

> **9.** Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to which their wrongful acts contributed to the damage.

[10] *See* Appendix A to this Report.

We think there is merit to this approach,[11] but that the Uniform Act does not go far enough. The plaintiff who has been contributorily negligent shares no portion of the burden of the shortfall. The result will be clearly unfair where the plaintiff's degree of contributory fault exceeds the fault of the wrongdoers among whom the shortfall is apportioned. Even where the plaintiff's degree of contributory fault is minimal, he should bear a proportionate share of the shortfall.

By adopting a method of fairly apportioning any shortfall that might arise in circumstances of shared liability, the single advantage of severing liability by reason of a plaintiff's contributory fault vanishes. The question then becomes who should bear the responsibility of establishing that there is, or is likely to be, a shortfall. If liability is several, that responsibility falls on the plaintiff and, if the issue is not capable of being resolved at trial, further proceedings will have to be commenced by the plaintiff. It is our conclusion that this responsibility is more fairly placed on the persons who caused the damage to the plaintiff. The result in *Cominco* should be reversed.

This approach also has desirable procedural consequences. Before *Cominco*, the responsiblity for identifying co-defendants was largely borne by those defendants sued by the plaintiff. Since the defendants were jointly and severally liable for the plaintiff's loss, they would join as third parties others who shared liability with them in order to protect their rights of contribution. After *Cominco*, that concern was no longer present when the plaintiff contributed to his own loss. In many cases, the defendants have much better knowledge of the circumstances of the accident and are better placed to locate co-defendants.

Adopting a shortfall apportionment rule will also encourage all parties to locate and join persons who share liability for the loss or damage. That too is a desirable result.

The Commission recommends that:

3. The fault of a person who contributes to his own loss or damage should not sever the liability of persons who, but for the contributory fault, would be jointly and severally liable for the loss or damage.

4. Where liability is joint and several and the court is satisfied that there is no reasonable possibility of collecting contribution or judgment from a party contributing to a person's loss or damage, the court shall make an order that it considers necessary to apportion the contribution or judgment that cannot be collected among the other parties proportionate to their degrees of fault.

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[11] This approach is in keeping with principles developed with respect to general average contribution and contribution among co-sureties. *See, e.g.*, Goff and Jones, *Law of Restitution*, 2d ed. (1978), at 212-14:

> It is doubtful whether common law allowed any contribution between co-sureties before the beginning of the nineteenth century. The early cases, which are reported in the cursory fashion, reject such a claim, apparently on the ground that to allow it would have been "a great cause of suits." Even when this uncompromising position was abandoned, the claim of a surety to contribution from each of his co-sureties was limited to the total amount owed by the principle debtor, divided by the number of sureties. No adjustment was made if one of the sureties was unable to pay his share because of insolvency. Little hardship was caused by this conservative rule of law, for from the early seventeenth century it had been established in equity that sureties "who *can* pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution." This conflict of law and equity was resolved in 1873 in favour of the rules of equity, and the modern law is based on the principles of equity governing the contribution of sureties *inter se*. . .
>
> Thus between themselves, co-sureties *prima facie* are *aequali jure*, although they can agree to be bound for different sums. It is, therefore, immaterial that they are bound jointly, jointly and severally or simply severally; that they are bound by the same or different instruments; that they are ignorant of each other's existence; or that the first surety agreed to become a surety before the second surety had even been approached; provided that they are co-sureties for the same principal and that their contracts of suretyship do not guarantee different debts.

Under the current law, a defendant whose liability is nominal may be required to satisfy a disproportionate share of the damages awarded the plaintiff. This will occur where his co-defendants are unavailable or financially unable to pay their share of the damages. Rights of contribution are of little assistance in these circumstances. Recommendation 4 goes some way towards mitigating the severity of the current law.

A. Contribution

1. Generally

At common law, a person who satisfied a contractual obligation he shared with others could call upon them to contribute.[1] There was no similar common law right to contribution for satisfaction of shared liability arising in tort. That position has been altered by the *Negligence Act*[2] which provides that, in the absence of agreement, persons who share liability are liable to make contribution and indemnify each other according to the degree in which they were at fault.

2. "Fault"

Section 4 of the *Negligence Act*, which provides a right of contribution, is not specifically restricted to damages caused by negligence. The term used is "fault," a word susceptible to a broad, or a narrow, interpretation. The meaning of "fault" has generated substantial litigation. For example, does it embrace liability for fault arising in contract or from an intentional tort? Or is it restricted to negligence?

In jurisdictions other than British Columbia, the statutory right to contribution has been generally restricted to liability for negligence, although in some cases it has been extended to other kinds of tortious liability, provided negligence is a component of the action.[3]

In British Columbia, "fault" has been interpreted more generously. While the issue is not free from doubt, there is authority for the proposition that the British Columbia Act applies to any breach of a duty of care, whatever the source of that duty.[4]

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[1] *Batard* v. *Hawes*, (1853) 2 El. & Bl. 287, 118 E.R. 775; if, however, co-contractors have arranged between themselves that one of them, though liable to the creditor, is not to be called upon to pay any portion of the debt, no action lies against him for contribution with respect to payments made by one of the others to the creditor, *Stainsleigh* v. *Fisher*, [1928] 2 W.W.R.205 (Alta.S.C.); *see also Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 48(3).

[2] R.S.B.C. 1979, c. 298, s. 4; *see also Law and Equity Act*, *ibid.*; a person who settles a matter before litigation is commenced is entitled to contribution under the *Negligence Act*: *Canadian Coachways (Alberta)* v. *Reynolds*, [1986] B.C.D. Civ. 2839-02 (S.C.).

[3] *Parmley* v. *Parmley*, [1945] S.C.R. 635; *see also Wah Tat Bank* v. *Chan*, [1975] 2 W.L.R. 475 [1975] A.C. 507 (P.C.). *Cf. Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.*, (1976) 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (C.A.), 84 D.L.R. (3d) 344 (S.C.C.); *Giffels Associates Ltd.* v. *Eastern Construction Co. Ltd.*, (1978) 84 D.L.R. (3d) 344 (S.C.C.); *Tompkins Hardware Ltd.* v. *North Western Flying Services Ltd.*, (1982) 139 D.L.R. (3d) 329 (Ont. H.C.). In the following cases, statutory provisions similar to the *Negligence Act* have been applied to actions in contract: *Halpern* v. *Locurto*, (1984) 26 A.C.W.S. (2d) 493 (Ont. H.C.); it has been held that damages can be apportioned for contributory negligence in an action for breach of contract: *Coopers & Lybrand* v. *H.E. Kane Agencies Ltd.*, (1985) 17 D.L.R. (4th) 695, 708 (N.B.C.A.):

> . . . whether one accepts the argument that at common law damages could be apportioned in actions in contract as well as in actions of tort and that the *Contributory Negligence Act*, R.S.N.B. 1973, s. C-19, should be applied by analogy, or adopts the theory of the reasonable expectations of the parties, or the notion of reliance that was either qualified or unreasonable, or simply that in fairness and to do justice the damages ought to be apportioned. . .

See also Canadian Western Natural Gas Co. Ltd. v. *Pathfinder Surveys Ltd.*, (1980) 12 Alta. L.R. (2d) 135, 12 C.C.L.T. 211 (Alta. C.A.); *Noel & Blanchette Construction* v. *Medican Const.*, (1984) 53 A.R. 17 (Alta. Q.B.); *Finance America* v. *Speed & Speed*, (1979) 38 N.S.R. (2d) 374, 12 C.C.L.T. 4 (N.S.C.A.); *Doiron* v. *Caisse Populaire D'Inkerman Ltee*, (1985) 17 D.L.R. (4th) 660 (N.B.C.A.); *A.G.N.S.* v. *Aza Avramovitch Associates Ltd.*, (1984) 11 D.L.R. (4th) 588 (N.S.S.C. App. Div.); *cf. A.B. Marintrans* v. *Comet Shipping Co. Ltd.*, [1985] 1 W.L.R. 1270 (Q.B.). All of these cases considered legislation which differs in some respects from the British Columbia *Negligence Act*.

[4] *Groves-Raffin Construction Ltd.* v. *Bank of Nova Scotia*, (1975) 51 D.L.R. (3d) 380, *rev'd.* on another point, (1976) 64 D.L.R. (3d) 78 (B.C.C.A.); *see also West Coast Finance Ltd.* v. *Gunderson, Stokes, Walton & Co.*, (1974) 44 D.L.R. (3d) 232 (B.C.S.C.), *aff'd.* (1975) 56 D.L.R. (3d) 460 (B.C.C.A.); *Palmer* v. *Littleton*, [1979] 4 W.W.R. 577 (B.C.S.C.); *LaFarge Cement of North America Ltd.* v. *C.N.R. Co.*, (1962) 34 D.L.R. (2d) 154 (B.C.S.C.); *District of Surrey* v. *Church*, (1977) 76 D.L.R. (3d) 721, *aff'd.* 101 D.L.R. (3d) 218 (B.C.C.A.); *Anderson* v. *Stevens*, [1981] 5 W.W.R. 550 (B.C.S.C.); *Rempel* v. *Parks* [1982] 3 W.W.R. 670 (B.C.S.C.); *Surrey* v. *Carroll-Hatch & Associates Ltd.*, (*sub. nom. Surrey* v. *Church*, [1979] 6 W.W.R. 289 (B.C.C.A.); *Michael Doyle & Associates Ltd.* v. *Bank of Montreal*, [1984] 5 W.W.R. 193 (B.C.C.A.); *Hancock* v. *Jade Excavating Ltd.*, [1986] B.C.D. Civ. 3079-03 (S.C.); *Canarim Investment Corporation Ltd.* v. *Jordan*, [1986] B.C.D. Civ. 144-03 (S.C.).

3. The Need for a Definition

In part, the confusion over the ambit of the statutory right to contribution stems from the historical origins of this legislation. Legislation was implemented to remedy the common law, which provided a right to contribution in many circumstances, but not in those involving joint tortfeasors. The statutory right to contribution was designed to close that gap. Cases involving shared liability that arises from different legal bases (for example, a breach of a contract or a statutory duty of care) present legal issues that are not satisfactorily dealt with by the common law or the statutory right to contribution. The courts have been asked to extend the operation of the statutory right to contribution.

To clarify the ambit of provisions respecting contribution in provincial legislation, the Uniform Act has adopted a broad definition of wrongful act:[5]

> "wrongful act" means an act or omission that constitutes
>
> (a) a tort,
>
> (b) a breach of contract or statutory duty that creates a liability for damages, or
>
> (c) a failure of a person to take reasonable care of his own person, property or economic interest,
>
> whether or not it is intentional.

The Uniform Act is designed to govern intentional and unintentional torts, including acts of negligence notwithstanding that the duty of care breached was created by statute or contract. Moreover, the Uniform Act governs contribution where the wrongful act was a breach of contract.

The English *Civil Liability (Contribution) Act 1978*, has a broader scope. It applies whenever there is joint liability to pay damages, whatever the legal basis of liability, "whether tort, breach of contract, breach of trust or otherwise".

In our opinion, the English Act probably goes too far in that it applies in circumstances where the common law rules regarding contribution appear to be operating satisfactorily. The Uniform Act, however, addresses issues which are still largely unresolved.

B. Vicarious Liability

A person may be liable for the tortious acts of another acting under his direction or in pursuit of his interests. For example, an employer may be liable for the tortious acts of his employee or a principal for those of his agent. A person who is responsible for the acts of another is said to be "vicariously liable." Someone vicariously liable for the acts of another person will be jointly liable with that person.

When joint liability arises in this way, the common law makes an exception to the usual rule denying contribution between persons sharing liability in tort. A party who acts innocently or is unaware of the tortious act of another will be entitled to indemnification. For example, an agent who, at the request of his principal, unwittingly commits a tort against a third party, will be entitled to indemnity from his principal. The common law implies a contractual warranty between the principal and agent as to the legality of the act requested.[6] An agent who, without his principal's direction or knowledge, commits a tort against a third party, will be required to indemnify his

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[5] *Uniform Contribution Fault Act*, s. 1, Uniform Law Conference of Canada 1984. *See* Appendix A to this Report. The Uniform Act adopts a different definition with respect to contributory negligence. In that case, the Act refers to a breach of a contractual duty of care, rather than a breach of contract. The contributory negligence provisions, consequently apply to joint tortfeasors and others whose liability flows from analagous fault.

[6] *See, e.g., Adamson* v. *Jarvis*, (1827) 4 Bing. 66, 130 E.R. 693.

principal. The common law implies a contractual duty to perform work with reasonable skill or care.[7]

In British Columbia, the *Negligence Act* provides that the statutory right to contribution applies only in the absence of an express or implied contract. The common law right to contribution in circumstances involving vicarious liability depends upon the finding of an implied contract. Consequently, the common law on this point still retains some importance.

The contributory negligence of a person seeking recovery from another on the basis of vicarious liability will be taken into account. While the *Negligence Act* speaks of the "fault of a person," and a person who is vicariously liable may not be at fault, the fault of his employee or agent will be imputed to him.

The Uniform Act applies to concurrent wrongdoers, a term which is defined to include persons who are vicariously liable. The British Columbia Act does not deal expressly with vicarious liability.

Certainly, issues of apportionment arise when a person is vicariously liable for the actions of another, and in that respect it is arguably desirable to deal with those issues in the context of a general statute on concurrent fault. On the other hand, vicarious liability would appear to be dealt with adequately under the current law. Moreover, vicarious liability presents special problems of apportionment, resting as it does on the concept of imputed fault, that are not neatly dealt with by provisions governing the apportionment of other kinds of shared fault.

It is our conclusion that vicarious liability is a discrete aspect of shared liability, and if problems in the law arise in that context, they should be dealt with separately from legislation designed to rationalize the general rules that apply to shared liability.

C. Releases and Judgments

Currently, a release of one person releases the others with whom he shares liability. A covenant not to sue, which is functionally similar to a release, does not have that effect.

The effect of a release follows from the nature of joint liability. Release of an indivisible obligation, the argument goes, must discharge all. While in the abstract, logic might well justify that sort of result, the practical consequences of the rule cannot be overlooked. The rule has the tendency to discourage settlement. A person liable to another will be unlikely to settle the matter unless he is released from further liability. A person who has suffered damages will be unlikely to execute a release (releasing all who share liability) unless the settlement applies to all of his damages. He would be unwise, for example, to accept settlement limited to a person's degree of liability.

The Uniform Act provides that an action against concurrent wrongdoers is not barred by the release of, or judgment against, any other concurrent wrongdoer. The Uniform Act refers to two kinds of releases:

(1) a partial release, which is a release of one or more, but not all concurrent wrongdoers; and

(2) a full release, which releases all concurrent wrongdoers.

A concurrent wrongdoer who receives a partial release is neither entitled nor

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[7] *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] A.C. 555 (H.L.); *Honeywill & Stein, Ltd.* v. *Larkin Bros. Ltd.*, [1934] 1 K.B. 191 (C.A.).

subject to contribution from other concurrent wrongdoers.[8] A partial release does not bar subsequent actions against other concurrent wrongdoers.[9]

A full release is treated in the same manner as if the concurrent wrongdoers who gave consideration for the release had satisfied a judgment. They are entitled to contribution from other concurrent wrongdoers. In that case, contribution is based on the lesser of the value given for the release, and the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

We have concluded that it is desirable to address the consequences of a release on rights to contribution, and that the approach taken by the Uniform Act should be adopted with one exception. Under the Uniform Act, a person who gives consideration for a partial release is not entitled to contribution. In some cases, some but not all persons who share liability will be the subject of the release, and a person who gives consideration for the release should be entitled to contribution from those who are thereby released from liability.

The Commission recommends that:

5. A person who gives consideration for a release, whether he was liable or not, should be entitled to contribution from those who are thereby released from liability, based on the lesser of

(a) the value of the consideration actually given for the release, and

(b) the value of the consideration that in all the circumstances would have been reasonable to give for the release.

6. A release of one or more persons does not bar an action against others whose fault contributed to the same damage or loss in respect of which the release is made.

A plaintiff is not entitled to more compensation than the measure of his damage or loss, and Recommendation 6 is not intended to alter that principle.

Recommendation 5 is not intended to provide a right of contribution against a person who would not have been liable to the plaintiff. Currently, a person who ostensibly shares liability with others, but who has a defence to the plaintiff's claim, is not required to contribute.[10] It is a precondition of the right to resort to contribution that there be liability to the plaintiff.[11] Our recommendations do not contemplate alteration of that principle.

It is unnecessary to refer to the consequences of a judgment. A judgment against a person does not bar action against others with whom he shares joint *and several* liability, only where their liability is joint. Earlier we recommended that joint liability should be deemed to be joint and several. This problem is addressed by Recommendation 1.

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[8] *Supra*, n. 5, s. 12(2).

[9] *Ibid.*, s. 15. These provisions of the Uniform Act conform to a large extent to the current law in British Columbia. In *Westcoast Transmission Company Limited* v. *Interprovincial Steel and Pipe Corporation Ltd.*, (1985) 60 B.C.L.R. 368 (B.C.S.C.) it was held that co-defendants were not entitled to contribution from one who had settled with the plaintiff. *Cf. Harper* v. *Gray & Walker*, [1985] 2 All E.R. 507 Q.B.; *A.R. (Al) Smith Ltd.* v. *Turner*, [1985] 2 W.W.R. 424 (B.C.S.C); in *Cuttell* v. *Bentz*, [1985] 6 W.W.R. 193 (B.C.C.A.), the plaintiff proceeded against one of several persons who shared liability for recovery of a discrete portion of his losses. The plaintiff was not barred from proceeding on the remainder of his claim in subsequent proceedings. *See also Lederer* v. *Dunlop*, (1985) 47 C.P.C. 242 (Ont. H.C.), where it is suggested that the rule that satisfaction of a claim by one of several who share liability should be confined to cases involving joint tortfeasors and that, in any event, the rule only applies where the plaintiff has received payment in full satisfaction.

[10] *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.*, *supra*, n. 3.

[11] *Giffels*, *supra*, n. 3; *Westcoast Transmission*, *supra*, n. 9. *See however*, *A.R. (Al) Smith*, *supra*, n. 8, where a defendant was permitted to proceed against persons sharing liability for contribution, notwithstanding the plaintiff would have been unable to do so since the limitation period for bringing an action had lapsed. The court characterized the proceedings as analogous to third party proceedings, subject to a six year limitation period.

D. Limits on Contribution

There are a number of circumstances where a person will share liability with others but his obligations are limited to less than his degree of fault. A person's liability may be affected by contract, statute or a rule of law or equity. For example, the plaintiff and one of the defendants may enter into a contract which provides that in the event of loss, the defendant's liability will be limited to a certain amount, or that the defendant will not be liable in any event. Limitation clauses or exclusion clauses of this kind are common. In effect they represent an agreement that the plaintiff, not the defendant, accepts the risk of damage or loss, and probably will insure against it. Similar provisions are to be found in legislation. Common carriers are permitted to limit their liability in the interests of commerce. A railroad company may transport goods worth millions of dollars at a cost which reflects the goods' weight or volume, not their value. Requiring owners who ship goods to insure against loss keeps transportation costs down, and this is perceived as in the community's best interests.

Liability may be limited for other reasons. In the last section we discussed releases. A plaintiff may settle his dispute with one of several co-defendants for less than his claim is worth, to avoid or simplify litigation.

In some cases, a plaintiff may not be permitted to proceed against one of several defendants because he was not diligent in bringing his action. As a matter of policy, at some time there should be an end to litigation. Legislation provides that after a certain period of time, depending on the nature of an action, proceedings may not be brought. Similarly, in some circumstances it is perceived to be unfair if a plaintiff delays too long before proceeding, and even if there is no limitation period involved, equity will not permit the plaintiff to proceed for an equitable remedy. That is the doctrine of laches.

The Uniform Act identifies situations where a right to contribution will not lie:

(1) No person is entitled to contribution from a person entitled to indemnification from him for the damages for which contribution is sought.[12]

(2) Contribution may not be had from a person exempt from liability for damages under a statute, such as the *Worker Compensation Act*,[13] or by release.[14]

The Uniform Act also provides that contribution may not be recovered from a person held not liable for the damages in issue.[15] That is not really an exemption. It provides that a person is not subject to "double jeopardy." His liability cannot be tested again in subsequent proceedings for contribution.

This approach favours finality in proceedings. On the other hand, it might be perceived as unfair that a person's right to contribution can be foreclosed by the results of proceedings to which he was not a party. While it is to be hoped that the earlier proceedings were unobjectionable, the possibility that the finding was incorrect cannot be ruled out. Perhaps evidence was missing, the proceedings were conducted incompetently, or the parties conspired together. These occurrences are possible, but there is no evidence to suggest they are likely.

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[12] *Supra*, n. 5, s. 10.

[13] *Ibid.*, s. 11. In British Columbia, the operation of the *Workers Compensation Act*, R.S.B.C. 1979, c. 437 prevents joint and several liability from arising, so that no rights of contribution would exist in any event: *Mitrunen* v. *Anthes Equipment Ltd.*, (1985) 65 B.C.L.R. 291 (C.A.); *cf. Kittleson* v. *Hertel*, [1984] B.C.D. Civ. 3079-01 (B.C.S.C.).

[14] *Ibid.*, s. 12.

[15] *Ibid.*, s. 13.

In all of these cases, the effect on a defendant's liability also has an effect on his co-defendants' rights of contribution from him. If his liability is extinguished, he is not required to contribute. His co-defendants' liability is unaffected, however. They will be responsible for the whole of the damages.

In each case, by reason of public policy, fairness, or the plaintiff's actions, a defendant is protected from full responsibility for the plaintiff's loss. His co-defendants, however, shoulder full responsibility and, consequently, will often be prejudiced by the current law.

The Uniform Act provides a method for more fairly apportioning responsibility to satisfy a judgment where a person is exempt from contribution. In those cases, the Uniform Act provides the amount of damages, liability, degrees of fault and rights of contribution are first determined as if there were no exemption. The amount of damages is then reduced as if the exempt person had satisfied the judgment according to his degree of fault. The co-defendants are not responsible for that portion of the damages. Apart from this, liability and rights of contribution of those sharing liability are unaffected by another's exemption. It is difficult to devise any other approach to resolving these questions and we have concluded that it should be adopted.

The Uniform Act then specifically identifies a number of circumstances where this approach is to operate. It is our tentative conclusion that underlying all of these cases is a single principle: where, by reason of public policy, fairness or the plaintiff's conduct, the liability of one of several co-defendants is limited or extinguished, the plaintiff should bear that portion of his loss. In the recommendation that follows, we define these circumstances in terms of a "special defence." Where one co-defendant has a special defence that limits or extinguishes his liability, the damages recoverable by the plaintiff are reduced by an amount proportionate to that co-defendant's fault. In that respect, our recommendation corresponds to the approach adopted by the Uniform Law Conference. It differs, however, in one important aspect. If the defendant's liability is not wholly extinguished then, we recommend, the plaintiff's judgment should include the amount for which the defendant remains liable. The plaintiff should be able to recover that amount from the other defendants who share liability, and they should be entitled to seek contribution from the defendant to the extent of his liability.

The Commission recommends that:

7. (1) For the purposes of this recommendation, "special defence" means

(a) a defence or a plea in abatement of damages which arises under, through the operation of, or by reason of

(i) a release,

(ii) a contract,

(iii) an enactment,

(iv) the expiration of a limitation period, or

(v) a rule of equity or public policy

which limits or extinguishes a person's liability for the damages in issue, or

(b) any case or instance in which the plaintiff by his conduct has disabled himself from obtaining full recovery from a defendant.

(2) No contribution may be recovered from a person

(a) whose fault, it has been found in a previous proceeding, did not contribute to, or

(b) whose liability is extinguished by a special defence with respect to

the damages in issue.

(3) The contribution recoverable from a person whose liability for damages is limited by a special defence shall not exceed the amount of the limitation.

(4) Where the contribution recoverable from one or more parties is reduced or extinguished under paragraph (2) or (3), damages payable by the parties found liable who do not have a special defence shall not exceed an amount calculated as follows: the whole of the damages less an amount proportionate to the fault of the person benefitting from the special defence plus the amount, if any, payable by the person benefitting from the special defence.

Example: P's property is damaged by D1, D2, D3 and D4, who are jointly and severally liable for the damages. P's damages are $100,000. P and D1 had entered into a contract limiting D1's liability to $1000. Liability is apportioned among D1, D2, D3 and D4. Each is 25% at fault.

The Current Law: The position under the current law is not entirely clear. P can recover from D2, D3 and D4, or any of them, $100,000. Say P recovers $100,000 from D4. D4 can seek contribution from his co-defendants. He can recover $25,000 from both D2 and D3. He can probably only recover $1000 from D1 and not the $24,000 that D1 is exempt from paying.

Under Recommendation 7: P can recover from D2, D3 and D4, or any of them, $76,000. (This amount is calculated pursuant to Recommendation 7(4) as follows:

Total damages	$100,000
− D1's proportionate share	−$ 25,000
+ the amount payable by D1	+$ 1,000
=	$ 76,000).

Say P recovers $76,000 from D4. D4 can recover $25,000 from both D2 and D3 and $1000 from D1. If D4 is successful in recovering contribution from his co-defendants, he will only pay $25,000. The $24,000 that D1 is exempt from paying is borne by the plaintiff.

It is our view that the issue of limits on contribution is best dealt with through a legislative statement of principle, and Recommendation 7 is drafted accordingly. In our deliberations Recommendation 7 was tested in a wide variety of situations, in all of which this approach appeared to operate satisfactorily. In the Working Paper that proceded this Report, comment was invited on whether this approach might embrace circumstances where the plaintiff should be able to proceed against co-defendants for the whole of his damages, or whether it failed to include circumstances where co-defendants' rights of contribution have been affected. Comment we received endorsed the recommended approach.

E. Is There A Need For Further Limits on Rights of Contribution?

One submission received on the Working Paper, raised for our consideration an apparent anomaly in the law governing contribution. One defendant, whose sole fault consists of failing to prevent another co-defendant from causing the plaintiff loss, may be required to pay contribution to that co-defendant. For example, D1 commits a fraud causing loss to the plaintiff. D2 is under a duty to the plaintiff to prevent the fraud, and breach of that duty renders D2 liable to the plaintiff. D1 satisfies the judgment. It would appear to be unjust to require D2 to contribute in circumstances where his share of fault consists solely of failing to prevent the person who seeks contribution from committing the wrongful act which caused the plaintiff loss or damage.[16]

The problem arises because of the approach adopted in the British Columbia *Negligence Act* to determining whether liability is joint and several and the extent of rights of contribution. The Act confuses these two issues. Under sections 1 and 2, the court is directed to determine the proportion each person was at fault for loss or damage suffered by the plaintiff. Section 4 provides that persons found at fault for loss or damage suffered by the plaintiff are jointly and severally liable to him. Persons jointly and severally liable to another have rights of contribution against each other, and these are determined by reference to their respective shares of fault for causing the loss or damage.

It is curious that the *Negligence Act* adopts this approach, since for the purposes of determining joint and several liability the court need only find that co-defendants were at fault. Their *proportions* of fault have no significance with respect to that issue. Proportion of fault may be an appropriate measure for determining rights of contribution, but there will be circumstances where rights and obligations existing between the co-defendants will suggest that a different approach is more fair, as in the fraud example. Unfortunately, the courts have no flexibility to determine rights of contribution other than by reference to each co-defendant's share of fault.[17]

A more natural approach to determining liability and rights of contribution would clearly distinguish between these two tasks. First, the court would determine whether the co-defendants shared responsibility for the loss or damage suffered by the plaintiff. If so, they would be jointly and severally liable to the plaintiff. The consequence of that finding is that each of the persons sharing liability would be responsible to the plaintiff for the whole of his loss, subject to the possibility that the plaintiff was contributorily negligent and the principle that the plaintiff can not recover more than his loss. After determining liability, the court would then consider rights of contribution, an issue generally only of significance between the co-defendants. Liability to contribute could be fixed by reference to each defendant's share of fault for causing the loss or damage, or by reference to other considerations appropriate in the circumstances.

The *Negligence Act* prevents the courts from determining rights of contribution with respect to the obligations and duties that may exist between co-defendants. In many cases, this will probably cause little, if any, injustice.

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[16] It is not clear whether courts would permit contribution in these circumstances, notwithstanding the provisions of the *Negligence Act*: *see, e.g., Westcoast Transmission, supra*, n. 9.

[17] It is assumed that the phrase in s. 1 of the *Negligence Act*, "the degree in which each person was at fault," refers to the degree in which each person's actions contributed to or caused another damage or loss, but the correct interpretation is by no means certain. In *Ottosen* v. *Kasper*, [1986] B.C.D. Civ. 3072-01 (C.A.), for example, it was said that these words "are words of fault. The question that affects apportionment therefore, is the weight of fault that should be attributed to each of the parties, not the weight of causation". This suggests that it may be open to the court to determine rights of contribution by assessing degrees of fault with respect to the rights and obligations between co-defendants.

A co-defendant's right of contribution will be illusory, for example, where he is required to indemnify the person from whom contribution is sought. Nevertheless, specific acknowledgment of this issue in legislation might be desirable. The Uniform Act provides, for example, that no person is entitled to contribution from a person entitled to indemnification from him for the damages for which contribution is sought. Incorporating a similar provision in the British Columbia Act would confirm the current position.

Rights of indemnity will not always provide an answer, however. No right of indemnity may exist between the co-defendants, or the extent of a right of indemnity may differ significantly from the liability to contribute. In these cases, however, a defendant from whom contribution is sought may have a separate cause of action against the person seeking contribution. For example, a manufacturer of a defective product and its retail seller may share liability to a purchaser. If the manufacturer satisfies the whole of the purchaser's damages, he may seek contribution from the vendor. The vendor, however, might be able to maintain an action in contract against the manufacturer for damages arising from the sale of the defective merchandise. The manufacturer's right of contribution would be set-off against the vendor's rights in contract.

It would appear, therefore, that in many circumstances where it would be undesirable or inappropriate to require a co-defendant to contribute, separate rights may be set-off against that liability. There is no guarantee, however, that rights of set-off will provide a complete answer. The person from whom contribution is sought may be unable to establish separate rights to extinguish liability to contribute, or they may only extinguish part of that liability. That would suggest that legislation might usefully add a further limit on rights to contribution. The principle would appear to be that no person should be entitled to contribution from another to the extent that the fault of the person from whom contribution is sought consists of a failure to prevent the wrongful act of the person seeking contribution.

These kinds of contribution problems are theoretically possible, but highly unlikely to arise in practice. Reported cases do not disclose that these problems do in fact arise. In the last decade or so, the law has witnessed an expansion of duty of care in order to fix upon a solvent defendant. In these cases, the person whose wrong actually caused the damage is usually insolvent, so that seldom, if at all, will he be able to satisfy a judgment and then seek contribution from a co-defendant whose fault consists of a failure to prevent his actionable wrong. This would suggest that there is little need for legislation to amend rights of contribution in this respect.

A corollary of this issue, however, must be addressed. A co-defendant whose fault consists of failing to prevent another's wrongful act is entitled to contribution only for the damages he pays in excess of that attributable to his portion of fault. It is our conclusion that, in these circumstances, a co-defendant should have a right to indemnification for the damages he is called upon to pay. This approach, combined with legislation providing that no right of contribution exists against a person entitled to indemnification, will resolve the problem identified by our correspondent.

The Commission recommends that:

8. No person be entitled to contribution from a person entitled to indemnification from him in respect of the amount of damages for which the contribution is sought.

9. To the extent that a person's fault consists of failing to prevent another's wrongful act, he should have a right of indemnification from the person who committed the wrongful act.

Recommendation 9 is not intended to give rise to an indemnity to a person *under a duty to* the person who commits the wrongful act to prevent the wrongful act. The indemnity is intended to arise only in favour of a person under a duty to a third party to prevent another's wrongful act.

CHAPTER V THE *UNIFORM CONTRIBUTORY FAULT ACT*

A. Introduction

In the Working Paper that preceeded this Report, it was contemplated that the British Columbia *Negligence Act* be retained, and revisions be made both to resolve certain problems and to bring British Columbia legislation in step with the *Uniform Contributory Fault Act*. One submission on the Working Paper urged that, instead, the Uniform Act be adopted.

Uniformity of the law on contributory negligence and rights of contribution is likely to be of benefit to litigants generally, particularly in those cases where the plaintiff may have a choice of jurisdiction. Moreover, the drafting of the Uniform Act is superior to the British Columbia *Negligence Act* in at least one important respect. The Uniform Act clearly distinguishes between issues of liability and rights of contribution. The Uniform Act also addresses a number of issues which, in British Columbia, are currently answered only by common law glosses on the *Negligence Act*.

On the whole, our recommendations are in keeping with the policy of the Uniform Act. Revising the Uniform Act to incorporate our recommendations is a relatively straightforward exercise. On the other hand, the revisions necessary to modify the British Columbia *Negligence Act* would be substantial.

It is our conclusion that the Uniform Act, with necessary revisions, be adopted.

The Commission recommends that:

10. The Uniform Contributory Fault Act, *revised to incorporate our recommendations, be adopted.*

In the balance of this Chapter is to be found a revised *Contributory Fault Act* with annotations. Deletions from the Uniform Act are indicated by brackets. Additions are in italics.

Two aspects of the *Negligence Act* need not be carried forward in new legislation. These relate to rights of set-off[1] and actions against personal representatives.[2]

The right to set-off cross demands is already provided by statute, the common law and the Rules of Court. Sections 2(d) and 3 of the *Negligence Act* add nothing to the general law of set-off.

Section 7 of the *Negligence Act* provides that a right of action exists against the deceased's personal representative. Since amended in 1980,[3] section 7 accomplishes nothing that is not achieved by section 66(4)(b) of the *Estate Administration Act*.[4]

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[1] *Negligence Act*, R.S.B.C. 1979, c. 298, s. 2(d) and s.3.
[2] *Ibid.*, s. 7.
[3] *Attorney General Statutes Amendment Act, 1980*, S.B.C. 1980, c. 1, s. 17, implementing a recommendation of the Commission: *see Annual Report* (LRC 45, 1979) at 17.
[4] R.S.B.C. 1979, c. 114.

B. Revised *Uniform Contributory Fault Act*

1. In this Act

"concurrent wrongdoers" means

(a) two or more persons whose wrongful acts contribute to the same damages suffered by another. [and any other] [person liable for the wrongful act of] [any of those persons; or]

[(b) a person whose wrongful act causes] [damage suffered by another and a per-] [son liable for the wrongful act;]

The definition of "concurrent wrongdoers" is used in those sections of the Uniform Act that deal with rights of contribution. This definition relies also upon the definition of "wrongful act."

The latter part of (a) and (b) refer to vicarious liability. In British Columbia rights of contribution in these circumstances are determined by contract or implied contract. Omitting these portions should not prevent the Act from controlling rights of contribution between a concurrent wrongdoer and a person vicariously liable for the wrongful acts of another concurrent wrongdoer. See section 16. It is difficult to see, moreover, how the provisions of the Uniform Act will operate to adjust rights between a concurrent wrongdoer and another vicariously liable for his wrongful acts.

"damage" includes economic loss;

The definition of "damage" refers to economic loss because the definitions of "fault" and "wrongful act" extend the operation of the act to breaches of contract.

"fault" means an act or omission that constitutes

(a) a tort,

(b) a breach of a statutory duty that creates a liability for damages,

(c) a breach of duty of care arising from a contract that creates a liability for damages, or

(d) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional.

The definition of "fault" is used in the contributory fault sections of the Act (sections 5 (1) — (3)). The reference to "a breach of a duty of care arising from a contract" should be contrasted with the reference in the definition of "wrongful act" to "a breach of contract . . . that creates a liability for damages."

The contributory fault provisions of the Uniform Act are intended to function much the same way as do the contributory negligence provisions of the British Columbia *Negligence Act*. The contributory fault provisions apply to joint and concurrent tortfeasors and others whose liability flows from analagous fault. Whether contributory fault should apply in all contractual contexts in the Uniform Act proved to be a contentious issue. The position adopted by the Uniform Law Conference of Canada was in response to the perception that contributory fault concepts in contract were dealt with by a number of common law doctrines and that extending the Uniform Act in this respect would have an unsatisfactory impact on the common law.

"release" includes a settlement or any other agreement limiting the liability of a person for damages, either in whole or in part;

Release is given a meaning broader than it would ordinarily have. It would appear to include a provision excluding or limiting liability in a contract made before the damage was caused.

"wrongful act" means an act or omission that constitutes

(a) a tort,

(b) a breach of contract or statutory duty that creates a liability for damages, or

(c) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional;

Compare with the definition of "fault." The Uniform Act provides a definition of "wrongful act" which applies when dealing with rights of contribution. The contribution sections of the Uniform Act apply when liability arises from a tort, a breach of a statutory duty of care, contributory negligence, and a breach of contract. This definition encompasses most situations in which rights of contribution arise. The most noteable exception is where liability arises from a breach of trust. The Uniform Act, consequently, is intended to govern rights of contribution in a broader range of cases than does the British Columbia *Negligence Act*. For example, in British Columbia, rights of contribution arising in a contractual context are, for the most part, governed by the common law.

GENERAL

[Act binds Crown]

[2. Her Majesty is bound by this Act.**]**

Section 2 is unnecessary in British Columbia because of section 14 of the *Interpretation Act*, R.S.B.C. 1979, c. 206.

Last clear chance

3. This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

Section 3 abolishes the doctrine of last clear chance. Section 8 of the current British Columbia Act provides:

> This Act applies to all cases where damage is caused or contributed to by the act of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

Section 3 would appear to be superior to the current section 8.

Questions of fact

4. In every action,

(a) the fault or the wrongful act, if any;

(b) the degree to which the fault or wrongful act of a person contributed to damage; and

(c) the amount of damages,

are questions for the trier of fact.

The British Columbia Act provides that:

> 6. In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

CONTRIBUTORY FAULT

Reduction of liability

5. (1) Where the fault of two or more persons contributes to damage suffered by one or more of them, the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage.

Contributory fault is addressed by section 5 of the Uniform Act. Apart from the definition of "fault", discussed above, section 5 differs little from the contributory negligence legislation in most commonwealth jurisdictions. A person's liability in damages is reduced by an amount proportionate to the contributory fault of the person suffering the damages.

In British Columbia, a person's contributory fault severs the liability of those contributing to his damages.

Claim by 3rd person

(2) Where a person, other than a person referred to in subsection (1), makes a claim arising from the damage suffered by a person referred to in subsection (1), the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person who suffered the damage from which the claim arose contributed to the damage.

Equal contribution

(3) If the degrees to which the fault of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Subsection (3) is the equivalent of section 1 (a) of the British Columbia Act.

***5.1** Unless the court other wise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damages.*

The Uniform Act has no equivalent to section 5.1 (patterned after section 3 of the British Columbia Act). This would appear to be a useful section.

CONCURRENT WRONGDOERS

Liability joint and several

6. The liability of concurrent wrongdoers for damages is joint and several.

Sections 6 to 8 are equivalent to sections 1 (a) and 4 of the British Columbia Act.

Contribution between concurrent wrongdoers

7. Subject to sections 8 to *13* [14], a concurrent wrongdoer is entitled to contribution from the other concurrent wrongdoers.

Amount

8. (1) The amount of contribution to which a concurrent wrongdoer is entitled from another concurrent wrongdoer is that amount of the total liability for damages of all concurrent wrongdoers that is proportionate to the degree to which the wrongful act of the other concurrent wrongdoer contributed to the damage.

Equal Contribution

(2) If the degrees to which the wrongful acts of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Apportionment of uncollectable contribution

9. (1) Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court [may] *shall*, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers proportionate to the degrees to which their wrongful acts contributed to the damage.

Section 9 (1) has been revised to provide that the apportionment of a shortfall is mandatory where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected.

(2) For the purposes of 9 (1) a person who suffers the damage, where his wrongful act contributed to it, shall be deemed to be a concurrent wrongdoer.

The Uniform Act does not permit a shortfall to be apportioned to a person who has been contributorily negligent. Section (2) has been added to permit that. See Recomendation 4.

Indemnity

10. *(1)* No person is entitled to contribution under this Act from a person who is entitled to be indemnified by him for the damages for which the contribution is sought.

See Recommendation 8.

(2) To the extent that a person's wrongful act consists of failing to prevent another's wrongful act he is entitled to be indemnified by the person who committed the wrongful act.

See Recommendation 9. This section has been drafted relying on the definition of "wrongful act" in section 1.

[Reduction of liability when Statutory exceptions]

These sections have been deleted. A revised section 11 and 12 follow.

[**11.** Where a concurrent wrongdoer is exempt from liability for damages under the *Workers Compensation Act*, the liability for damages of the concurrent wrongdoers who are not exempt is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are exempt contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are exempt and those who are not exempt.]

[**12.** (1) This section applies where a person suffering damage enters into a release with a concurrent wrongdoer, whether before or after the damage is suffered.]

[Reduction of liability when partial release]

[(2) Where the person suffering the damage does not release all concurrent wrongdoers, the liability for damages of those concurrent wrongdoers who are not released is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are released contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are released and those who are not released.]

11. (1) In this section, "special defence" means

(a) a defence or a plea in abatement of damages which arises under, through the operation of, or by reason of

(i) a release,

(ii) an enactment,

(iii) the expiration of a limitation period, or

(iv) a rule of equity or public policy

which limits or extinguishes the liability of a concurrent wrongdoer for the damages in issue, or

(b) any case or instance in which the person suffering damages by his conduct has disabled himself from obtaining full recovery from a concurrent wrongdoer.

See Recommendation 7. The definition of "release" removes the need to refer to a contract in 11.(1) (a).

(2) No contribution may be recovered from a person

(a) whose wrongful act, it has been found in a previous proceeding, did not contribute to, or

(b) whose liability is extinguished by a special defence with respect to

the damages in issue.

(3) The contribution recoverable from a concurrent wrongdoer whose liability for damages is limited by a special defence shall not exceed the amount of the limitation.

(4) Where the contribution recoverable from one or more concurrent wrongdoers is reduced or extinguished under (2) or (3), damages payable by the concurrent wrongdoers found liable who do not have a special defence shall not exceed an amount calculated as follows: the whole of the damages less an amount proportionate to the wrongful act of the concurrent wrongdoer benefitting from the special defence plus the amount, if any, payable by the concurrent wrongdoer benefitting from the special defence.

Contribution when full release

12. [(3) Where all concurrent wrongdoers are released,] A person who gives consideration for a release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with this Act from any other concurrent wrongdoer *thereby released* based on the lesser of

(a) the value of the consideration actually given for the release; and

(b) the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

See Recommendation 5. The Uniform Act does not permit contribution where there is only a partial release (subsections 12 (1) and (2)).

[Effect of holding of no liability]

[13. In proceedings against a person for con-] [tribution under this Act, the fact that the person] [has been held not liable for damages in an] [action brought by or on behalf of the person] [who suffered the damage is conclusive proof in] [favour of the person from whom contribution is] [sought as to any issue that has been determined] [on its merits in the action.]

Deleted. This concept is addressed in section 11 (2) of this draft.

Execution between concurrent wrongdoers

13. **[14.]** Unless the person suffering the damage has been fully compensated or the court otherwise orders, a concurrent wrongdoer shall not issue execution on a judgment for contribution from another concurrent wrongdoer until

(a) he satisfies that amount of the total damages that is proportionate to the degree to which his wrongful act contributed to the damage; and

(b) the court makes provision for the payment into court of the proceeds of the execution to the credit of those persons that the court may order.

Releases and judgments

14. **[15.]** An action against one or more concurrent wrongdoers is not barred by

(a) a release or any other concurrent wrongdoer; or

(b) a judgment against any other concurrent wrongdoer,

and may be continued notwithstanding the release or judgment.

See Recommendation 6.

Previous judgment binding in second action

15. A person who receives a judgment against a concurrent wrongdoer in which the whole of his damages is assessed, is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer.

See Recommendation 2.

[16. (1) Where a judgment determines the] [total liability for damages of concurrent wrong-] [doers in an action against one or more of them,] [the person suffering the damage is not entitled] [to have the total liability determined in a higher] [amount by a judgment in the same or any other] [action against any other concurrent wrong-] [doer.]

[Costs]

[(2) Except in an action first taken against a] [concurrent wrongdoer, the person suffering] [damage is not entitled to costs in any action] [taken against any other concurrent wrongdoer] [unless the court is of the opinion that there were] [reasonable grounds for bringing more than one] [action.]

Subsection (2) has been deleted. There is no evidence that this provision is necessary in British Columbia.

16. Nothing in this Act alters the principles of vicarious liability.

See the comment accompanying the definition of "concurrent wrongdoers" in section 1.

A. Title of the *Negligence Act*

The *Negligence Act* is, in many respects, mistitled. The Act deals with apportionment of fault and contribution, and applies to many kinds of fault other than negligence. Our recommendations, when implemented, will further emphasize the inappropriateness of this Act's title. In the Working Paper, we suggested that the title *"Shared Liability Act,"* might be adopted. Since it is recommended that the *Uniform Contributory Fault Act* be adopted, with several exceptions, the new legislation should be titled the *Contributory Fault Act*.

B. Consequential Amendments

Earlier it was recommended that the concept of joint liability need not be retained, and that in all circumstances where persons were jointly liable their liability should be deemed to be joint and several.

A computer assisted search of British Columbia statutes disclosed a number of sections which rely on or address the concept of joint liability. Legislation implementing Recommendation 1 should be accompanied by legislation revising these sections. The text of these sections, and the recommended revisions to them are to be found in Appendix C.

The Commission recommends that:

11. The consequential amendments recommended in Appendix C be implemented when legislation to implement Recommendation 1 is introduced.

C. List of Recommendations

The following is a summary of the recommendations set out in this Report:

Amendment to the *Law and Equity Act*

1. The Law and Equity Act *be amended by adding a provision comparable to the following:*

Where two or more persons are, but for this section, jointly liable to satisfy a common obligation, their liability is deemed to be joint and several. (Page 15)

Amendments to Contributory Fault Legislation

2. A person who receives a judgment against a concurrent wrongdoer in which the whole of his damages is assessed, is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer. (Page 17)

3. The fault of a person who contributes to his own loss or damage should not sever the liability of persons who, but for the contributory fault would be jointly and severally liable for the loss or damage. (Page 22)

4. Where liability is joint and several and the court is satisfied that there is no reasonable possibility of collecting contribution or judgment from a party contributing to a person's loss or damage, the court shall make an order that it considers necessary to apportion the contribution or judgment that cannot be collected among the other parties proportionate to their degrees of fault. (Page 22)

5. A person who gives consideration for a release, whether he was liable or not, should be entitled to contribution from those who are thereby released from liability, based on the lesser of

(a) the value of the consideration actually given for the release, and

(b) the value of the consideration that in all the circumstances would have been reasonable to give for the release. (Page 27)

6. A release of one or more persons does not bar an action against others whose fault contributed to the same damage or loss in respect of which the release is made. (Page 27)

7. (1) For the purposes of this recommendation, "special defence" means

(a) a defence or a plea in abatement of damages which arises under, through the operation of, or by reason of

(i) a release,

(ii) a contract,

(iii) an enactment,

(iv) the expiration of a limitation period, or

(v) a rule of equity or public policy

which limits or extinguishes a person's liability for the damages in issue, or

(b) any case or instance in which the plaintiff by his conduct has disabled himself from obtaining full recovery from a defendant.

(2) No contribution may be recovered from a person

(a) whose fault, it has been found in a previous proceeding, did not contribute to, or

(b) whose liability is extinguished by a special defence with respect to

the damages in issue.

(3) The contribution recoverable from a person whose liability for damages is limited by a special defence shall not exceed the amount of the limitation.

(4) Where the contribution recoverable from one or more parties is reduced or extinguished under paragraph (2) or (3), damages payable by the parties found liable who do not have a special defence shall not exceed an amount calculated as follows: the whole of the damages less an amount proportionate to the fault of the person benefitting from the special defence plus the amount, if any, payable by the person benefitting from the special defence. (Pages 29-30)

8. No person be entitled to contribution from a person entitled to indemnification from him in respect of the amount of damages for which the contribution is sought. (Page 32)

9. To the extent that a person's fault consists of failing to prevent another's wrongful act, he should have a right of indemnification from the person who committed the wrongful act. (Page 33)

10. The Uniform Contributory Fault Act, *revised to incorporate our recommendations, be adopted. (Page 34)*

11. The consequential amendments recommended in Appendix C be implemented when legislation to implement Recommendation 1 is introduced. (Page 41)

D. Acknowledgments

The Commission would like to thank those persons who responded to the Working Paper which preceded this Report. The submissions we received

were few in number, but well considered and extremely useful in preparing this Report.

The Commission would also like to acknowledge the work of Anthony S. Spence, former Counsel to the Commission, who conducted the initial research on this subject, and that of Thomas G. Anderson, who, subject to the Commission's direction, prepared the Working Paper and this Report.

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August 7, 1986.

APPENDICES

Appendix A

UNIFORM CONTRIBUTORY FAULT ACT

Interpretation

1. In this Act,

"concurrent wrongdoers" means

(a) two or more persons whose wrongful acts contribute to the same damages suffered by another, and any other person liable for the wrongful act of any of those persons; or

(b) a person whose wrongful act causes damage suffered by another and a person liable for the wrongful act;

"damage" includes economic loss;

"fault" means an act or omission that constitutes

(a) a tort,

(b) a breach of a statutory duty that creates a liability for damages,

(c) a breach of duty of care arising from a contract that creates a liability for damages, or

(d) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional.

"release" includes a settlement or any other agreement limiting the liability of a person for damages, either in whole or in part;

"wrongful act" means an act or omission that constitutes

(a) a tort,

(b) a breach of contract or statutory duty that creates a liability for damages, or

(c) a failure of a person to take reasonable care of his own person, property or economic interest,

whether or not it is intentional;

GENERAL

Act binds Crown

2. Her Majesty is bound by this Act.

Last clear chance

3. This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

Questions of fact

4. In every action,

(a) the fault or the wrongful act, if any;

(b) the degree to which the fault or wrongful act of a person contributed to damage; and

(c) the amount of damages,

are questions for the trier of fact.

CONTRIBUTORY FAULT

Reduction of liability

5. (1) Where the fault of two or more persons contributes to damage suffered by one or more of them, the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person suffering the damage contributed to the damage.

Claim by 3rd person

(2) Where a person, other than a person referred to in subsection (1), makes a claim arising from the damage suffered by a person referred to in subsection (1), the liability for damages of a person whose fault contributed to the damage is reduced by an amount of the damages proportionate to the degree to which the fault of the person who suffered the damage from which the claim arose contributed to the damage.

Equal contribution

(3) If the degrees to which the fault of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

CONCURRENT WRONGDOERS

Liability joint and several

6. The liability of concurrent wrongdoers for damages is joint and several.

Contribution between concurrent wrongdoers

7. Subject to sections 8 to 14, a concurrent wrongdoer is entitled to contribution from the other concurrent wrongdoers.

Amount

8. (1) The amount of contribution to which a concurrent wrongdoer is entitled from another concurrent wrongdoer is that amount of the total liability for damages of all concurrent wrongdoers that is proportionate to the degree to which the wrongful act of the other concurrent wrongdoer contributed to the damage.

Equal Contribution

(2) If the degrees to which the wrongful acts of persons contributed to damage cannot be determined in relation to each other, those persons shall be deemed to have contributed equally in relation to each other.

Apportionment of uncollectable contribution

9. Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to the degrees to which their wrongful acts contributed to the damage.

Indemnity

10. No person is entitled to contribution under this Act from a person who is entitled to be indemnified by him forthe damages for which the contribution is sought.

Reduction of liability when statutory exceptions

11. Where a concurrent wrongdoer is exempt from liability for damages under the (*Workers' Compensation Act*), the liability for damages of the concurrent wrongdoers who are not exempt is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are exempt contributed to the damage, and there shall be no contribution between those concurrnt wrongdoers who are exempt and those who are not exempt.

(NOTE: Any other statute that exempts a concurrent wrongdoes from liability for damages can also be inserted.)

12. (1) This section applies where a person suffering damage enters into a release with a concurrent wrongdoer, whether before or after the damage is suffered.

Reduction of liability when partial release

(2) Where the person suffering the damage does not release all concurrent wrongdoers, the liability for damages of those concurrent wrongdoers who are not released is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are released contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are released and those who are not released.

Contribution when full release

(3) Where all concurrent wrongdoers are released, a person who gives consideration for the release, whether he is a concurrent wrongdoer or not, is entitled to contribution in accordance with this Act from any other concurrent wrongdoer based on the lesser of

(a) the value of the consideration actually given for release; and

(b) the value of the consideration that in all the circumstances it would have been reasonable to give for the release.

Effect of holding of no liability

13. In proceedings against a person for contribution under this Act, the fact that the person has been held not liable for damages in an action brought by or on behalf of the person who suffered the damage is conclusive proof in favour of the person from whom contribution is sought as to any issue that has been determined on its merits in the action.

Execution between concurrent wrongdoers

14. Unless the person suffering the damage has been fully compensated or the court otherwise orders, a concurrent wrongdoer shall not issue execution on a judgment for contribution from another concurrent wrongdoer until

(a) he satisfies that amount of the total damages that is proportionate to the degree to which his wrongful act contributed to the damage; and

(b) the court makes provision for the payment into court of the proceeds of the execution to the credit of those persons that the court may order.

Releases and judgments

15. An action against one or more concurrent wrongdoers is not barred by

(a) a release of any other concurrent wrongdoer; or

(b) a judgment against any other concurrent wrongdoer,

and may be continued notwithstanding the release or judgment.

Previous judgment binding in second action

16. (1) Where a judgment determines the total liability for damages of concurrent wrongdoers in an action against one or more of them, the person suffering the damage is not entitled to have the total liability determined in a higher amount by a judgment in the same or any other action against any other concurrent wrongdoer.

Costs

(2) Except in an action first taken against against a concurrent wrongdoer, the person suffering damage is not entitled to costs in an action taken against any other concurrent wrongdoer unless the court is of the opinion that there were reasonable grounds for bringing more than one action.

APPENDIX B

NEGLIGENCE ACT

R.S.B.C. 1979, Chapter 298

Apportionment of liability for damages

1. Where by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault, except that

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(b) nothing in this section shall operate so as to render a person liable for damage or loss to which his fault has not contributed.

Provisions governing awarding of damages

2. The awarding of damage or loss in every action to which section 1 applies shall be governed by the following provisions:

(a) the damage or loss, if any, sustained by each person shall be ascertained and expressed in dollars;

(b) the degree in which each person was at fault shall be ascertained and expressed in the terms of a percentage of the total fault;

(c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss shall be entitled to recover from that other person the percentage of the damage or loss sustained as corresponds to the degree of fault of that other person;

(d) as between 2 persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled shall be set off one against the other, and if either person is entitled to a greater amount than the other, he shall have judgment against that other for the excess.

Apportionment of liability for costs

3. Unless the court otherwise directs, the liability for costs of the parties to every action shall be in the same proportion as their respective liability to make good the damage or loss. The provisions of section 2 governing the awarding of damage or loss apply, with the necessary changes and so far as applicable, to the awarding of costs, with the further provision that where, as between 2 persons, one is entitled to a judgment for an excess of damage or loss and the other to a judgment for an excess of costs there shall be a further set off of the respective amounts and judgments shall be given accordingly.

Liability of joint tortfeasors and right of contribution

4. Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault, and except as provided in section 5 where 2 or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

Negligence of spouse

5. In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of that spouse, and the portion of the loss or damage caused by the fault or negligence of that spouse shall be determined although that spouse is not a party to the action.

Questions of fact

6. In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

Actions against personal representatives

7. (1) Where a person dies who, because of this Act, would have been liable for damages or costs had he continued to live, an action or third party proceedings that, because of this Act, could have been brought or maintained against the person who has died may be brought and maintained or, if pending, may be continued against the personal representative of the deceased person, and the damages and costs recovered are payable out of the estate of the deceased person in similar order of administration as the simple contract debts of the deceased person.

(2) If there is no personal representative of the deceased person appointed in the Province within 3 months after his death, the court, on the application of a party intending to bring or continue an action or third party proceedings under this section, and on the notice of other parties, either specially or generally by public advertisement, as the court may direct, may appoint a representative of the estate of the deceased person for all purposes of the intended or pending action or proceedings and to act as defendant in them. The action or proceedigns brought or continued against the representative so appointed and all proceedings in them shall bind the estate of the deceased person in all respects as if a duly constituted personal representative of the deceased person were a party to the action.

(3) No action or third party proceedings shall be brought against a personal representative under subsection (1), or against a representative of the estate appointed under subsection (2), after the time otherwise limited for bringing the action.

Further application

8. This Act applies to all cases where damage is caused or contributed to by the act of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

APPENDIX C

CONSEQUENTIAL AMENDMENTS

Recommendation 11 provides as follows:

11. The consequential amendments recommended in Appendix C be implemented when legislation to implement Recommendation 1 is introduced.

Three provisions of the British Columbia Statutes refer to joint liability. These should be revised to refer to joint and several liability. They are as follows (amendments are in italics):

1. *Taxation (Rural Area) Act*, R.S.B.C. 1979, c. 400

30. (2) A person who acquires property on which a lien under this Act exists is jointly *and severally* liable with the owner originally assessed for payment of the taxes.

2. *School Act*, R.S.B.C. 1979, c. 375

115. Where a pupil wilfuly or carelessly mutilates or destroys or without permission or authority removes school property, his parent or guardian may be held liable in damages jointly *and severally* with the pupil.

3. *Mineral Land Tax Act*, R.S.B.C. 1979, c. 260

9. (3) Where mineral land is owned by more than one owner, the owners are jointly *and severally* liable for the mineral land tax.

(4) Where the parcels contained in a production tract are owned by more than one owner, the owners are jointly *and severally* liable for the mineral land tax.

Two sections of the *Partnership Act*, R.S.B.C. 1979, c. 312 alter the joint liability of partners to parallel more closely the consequences of joint and several liability:

11. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner, and after his death his estate is also severally liable in a due course of administration for those debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts.

85. Until a new declaration is made and filed by him or by his partners, or any of them as aforesaid, no signer shall be deemed to have ceased to be a partner; but nothing herein shall exempt from liability any person who, being a partner, fails to declare the same as already provided; and that person may, notwithstanding the omission, be sued jointly with the partners mentioned in the declaration, or they may be sued alone, and if judgment is recovered against them, any other partner or partners may be sued jointly or severally in an action on the original cause of action on which the judgment was rendered; nor shall anything in this Part be construed to affect the rights of any partners with regard to each other, except that no declaration as aforesaid shall be controverted by any signer of it.

These sections should be revised as follows:

11. Every partner in a firm is liable jointly and severally with the other partners for all debts and obligations of the firm incurred while he is a partner.

85. Until a new declaration is made and filed by him or by his partners, or any of them as aforesaid, no signer shall be deemed to have ceased to be a partner; but nothing herein shall exempt from liability any person who, being a partner, fails to declare the same as already provided; nor shall anything in this Part be construed to affect the rights of any partners with regard to each other, except that no declaration as aforesaid shall be controverted by any signer of it.

Section 48 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 was discussed in some detail in Chapter II. For convenience we repeat it here:

48. (1) Where a party has a demand recoverable against 2 or more persons jointly liable it is sufficient if any of the persons is served with process, and an order may be obtained and execution issued against the person served notwithstanding that others jointly liable may not have been served or sued or may not be within the jurisdiction of the court.

(2) The obtaining of an order against any one person jointly liable does not release any others jointly liable who have been sued in the proceeding, whether the others may have been served with process or not.

(3) Every person against whom an order has been obtained, and who has satisfied the order, is entitled to demand and recover in the court contribution from any other person jointly liable with him.

This section modifies the consequences of joint liability to more closely parallel joint and several liability. When legislation is introduced to implement Recommendation 1, section 48 will become redundant and should be repealed.

Rule 5 (4) of the British Columbia Rules of Court provides as follows:

> 5 (4) Where relief is claimed against a person who is jointly liable with some other person, the other person need not be made party to the proceeding; but where persons may be jointly, but not severally, liable and relief is claimed against some but not all of these persons in a proceeding, the court may stay the proceeding until the other persons who may be liable are added as parties.

This Rule should be repealed. A plaintiff need not proceed against all persons who share joint and several liability. The court will retain jurisdiction to add a necessary party under Rule 15 (5). It should be observed that the jurisdiction to stay a proceeding until a necessary party is joined is not expressly provided for in Rule 15 (5). Such an amendment may be desirable, but this issue should more appropriately be considered by the Rules Committee rather than the Commission.

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